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Supreme Court, U.S.

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No. 89-

In The
Supreme Court of the United States
October Term, 1989

PARK CENTER WATER DISTRICT,

Petitioner,

v.

UNITED STATES OF AMERICA, STATE OF COLORADO,
AND DIVISION ENGINEER, WATER DIVISION NO. 2,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

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QUESTION PRESENTED

Under the implied-reservation-of-water doctrine, a federal reserved water right was awarded by the Colorado Supreme Court for the entire flow of water from the Park Center Well, an oil and gas well that was converted to a water well pursuant to the Oil and Gas Conversion Act of June 16, 1934. The question presented is:

In applying the doctrine to the Park Center Well, is the Colorado Supreme Court bound by the federal rule defined in *United States v. New Mexico* that limits the federal reserved water right to that "*minimal amount of water necessary to ensure that the primary purposes of the land reservation are not entirely defeated,*" or can it determine the water right on the basis of a different rule that defines the federal reserved water right as that amount of water that is "no more than necessary to fulfill the purposes of the Oil and Gas Conversion Act?"

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

OPINIONS BELOW

The Petitioner, Park Center Water District, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Colorado Supreme Court entered on October 23, 1989 and reported as *Park Center Water District v. United States*, 781 P.2d 90 (Colo. 1989). That opinion is reprinted at pages App. 1-20 of the Appendix. The opinion of the Colorado District Court, Water Division No. 2 (Findings of Fact, Conclusions of Law and Decree, Case No. 81CW192, May 7, 1988) is reprinted at pages App. 21-51.

JURISDICTION

The decision of the Colorado Supreme Court was rendered on October 23, 1989, affirming the Findings of Fact, Conclusions of Law and Decree of the Colorado District Court, Water Division No. 2, Case No. 81CW192. The judgment of the Colorado Supreme Court is final on its face. No petition for rehearing was sought. The jurisdiction of this Court to review the judgment of the Colorado Supreme Court is invoked under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

The principal statute that this case involves is the Oil and Gas Conversion Act of June 16, 1934. It is reprinted at page App. 52-53.

STATEMENT OF THE CASE

This case concerns the measure of the federal reserved water right to water flowing from the Park Center Well, a converted oil and gas well located within the Arkansas River drainage in Fremont County, Colorado.

The Park Center Well was drilled in the 1920s on vacant public land under a federal oil and gas prospecting permit issued to the Mutual Oil and Development Company pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.* However, instead of striking oil or gas, the well intercepted water under artesian pressure. Under the terms of its drilling permit, Mutual was obligated to plug and abandon the water-producing well or forfeit its drilling bond.

Before Mutual got around to plugging the Park Center Well, Congress amended the Mineral Leasing Act of 1920 with the Oil and Gas Conversion Act of June 16, 1934 ("Conversion Act").¹ In that Act, Congress recognized the irony of shutting off perfectly good sources of water in the arid Western states. In an effort to preserve those water supplies, Congress authorized the purchase of the casings of oil and gas exploration wells that had intercepted water so that they could be completed as water producing wells. As a condition precedent to such purchase, the land on which such wells were situated was to be "reserved as a water hole under section 10 of the Act of December 29, 1916."² Once the land was reserved

¹ The Conversion Act is reprinted at App. 52-53.

² The Act of December 29, 1916 is also referred to as the Stock Raising Homestead Act, 43 U.S.C. §§ 291 *et seq.*

and the well completed as a water producing well, the Secretary of Interior was then to use the water on public lands or dispose of the water for beneficial use on other lands.

On September 27, 1934, the land on which the Park Center Well is located was reserved pursuant to Order of Interpretation No. 209 and Executive Order of Withdrawal dated April 17, 1926, a/k/a Public Water Reserve No. 107. The casing of the Park Center Well was subsequently purchased by the federal government in 1936, and the Park Center Well was then completed as a water producing well.

Water flowing from the Park Center Well has always been used by the Park Center Water District ("Park Center") or its predecessor, Canyon Heights Irrigation and Reservoir Company.³ The United States has granted these entities access to the Park Center Well through a series of leases beginning in 1937.

In 1972, Park Center filed an application in Colorado District Court, Water Division No. 2 ("water court") for a water right to the water flowing from the Park Center Well. This filing was necessitated by a provision of Colorado's Water Right Determination and Administration

³ Water flowing from the Park Center Well is not presently and has never been beneficially used: (a) for any purpose upon the land withdrawn from public entry pursuant to Public Water Reserve No. 107, (b) for human drinking or stock watering by owners or operators of stock raising homesteads patented under the Stock Raising Homestead Act, or (c) for any purpose upon any other public lands or federally reserved or withdrawn lands. App. 24.

Act of 1969, Colo. Rev. Stat. §§ 37-92-101 *et seq.*, that required persons with water rights in ground water to file applications for a determination of those rights no later than July 1, 1972 in order to preserve the actual appropriation date of such rights.⁴ The water court, on April 24, 1973, entered a decree in Case No. W-1499 awarding a water right to Park Center in the Park Center Well for 708 gallons per minute for domestic and irrigation purposes with a priority date of January 8, 1938.⁵ The United States did not oppose Park Center's claim to water flowing from the Park Center Well.

In May, 1979, the United States was served, pursuant to the McCarran Amendment, 43 U.S.C. § 666, with the December, 1978, resume for Water Division No. 2. In response, the United States filed a general application with the water court in December, 1979 (Case No. 79CW176) to confirm its reserved and appropriative

⁴ In Colorado, water rights are obtained by a combination of acts and intent constituting appropriation. No adjudication of the water right is necessary to perfect the right itself. Recognition of the water right within the priority system, however, does require adjudication. Moreover, in order to retain the actual appropriation date as the priority for the water right, the appropriator must appear in the first available adjudication proceeding after the appropriation. Otherwise, the water right is subject to the "postponement" doctrine which, generally stated, makes water rights decreed in one year junior to all priorities awarded in decrees entered in prior years regardless of the actual appropriation dates. *See* Colo. Rev. Stat. § 37-92-306; *U.S. v. Bell*, 724 P.2d 631, 641-45 (Colo. 1986). Under Colorado law, the filing period for the first available adjudication proceeding for confirming water rights to water from wells ended on July 1, 1972. Colo. Rev. Stat. § 37-92-306.

⁵ The Park Center Decree is reprinted at App. 54-57.

water rights to the use of water on lands owned by it within Water Division No. 2. Subsequently, in November, 1981, the United States filed its application in Case No. 81CW192 which specifically asserted a claim to water flowing from the Park Center Well. The United States asserted that under the implied-reservation-of-water doctrine,⁶ it was entitled to the award of a water right for the entire yield of the Park Center Well with a priority that antedated priorities awarded in previously entered decrees.⁷

Park Center objected to the application because Park Center had a vested property right to water flowing from the same Park Center Well by virtue of its decree, entered almost 9 years earlier by the same water court. In response to Park Center's objection, the United States argued that Park Center's participation in an earlier Interior Board of Land Appeals proceeding, as well as certain language in the leases between the United States and Park Center (and Park Center's predecessor), precluded Park Center's challenge.

The water court ruled in favor of the United States. On May 7, 1988 the water court entered a decree that awarded the United States a reserved water right to the

⁶ This doctrine is a creation of this Court, *see infra* at 7-8, and, as such, presented a federal question for the water court to resolve.

⁷ In essence, the United States claimed that this was the first available adjudication proceeding for determining federal reserved water rights in Water Division No. 2 and, as such, Colorado's "postponement" doctrine was not applicable. *See* note 4 *supra*.

entire flow of water from the Park Center Well with a priority date that antedates Park Center's decreed water right.⁸ In addition, the water court ruled that Park Center was estopped to challenge the reserved water right. App. 31-36.

The Colorado Supreme Court agreed with the water court's determination of the amount and priority of the federal reserved water right for the Park Center Well. As such, the court did not address the estoppel issues. App. 12, 19.

In affirming the water court's decision on the measure of the federal reserved water right,⁹ the Colorado Supreme Court recognized that neither Section 10 of the Stock Raising Homestead Act nor Public Water Reserve No. 107, pursuant to which the land on which the Park Center Well is situated was withdrawn, supported a reservation of the entire yield of the Park Center Well. As a result, the court concluded that the "source of the [water]

⁸ In particular, the water court determined that the United States was entitled to a federal reserved water right of 2.67 cubic feet per second from the Park Center Well with a priority date of May 29, 1936. App. 50. Although the priority date would normally have been the date that the land upon which the Park Center Well was reserved (*i.e.*, September 27, 1934), the water court awarded the May 29, 1936 date because that was the priority date that the United States asked for in its water rights application. The United States agreed to accept that date to avoid a republication of the application. App. 11, 43-44.

⁹ The issues related to the *priority* of the federal reserved water right are principally state law issues and will not be presented to this Court.

reservation must come from the Conversion Act" itself. The court then listed two purposes of the Conversion Act, neither of which were identified as "primary purposes". In the final step of its federal reserved water right analysis the court concluded that the entire yield of the Park Center Well is "no more than the amount of water needed to fulfill" these purposes. App. 14-17.

REASONS FOR GRANTING THE WRIT

- I. THE COLORADO RULE FOR QUANTIFYING FEDERAL RESERVED WATER RIGHTS CONFLICTS WITH THE PRINCIPLES ANNOUNCED BY THIS COURT IN *UNITED STATES V. NEW MEXICO* AND, IF LEFT TO STAND, WILL GREATLY EXPAND THE IMPLIED-RESERVATION-OF-WATER DOCTRINE AND SUBJECT PRIVATE WATER USERS TO A MUCH BROADER SET OF FEDERAL RESERVED WATER RIGHT CLAIMS.

The implied-reservation-of-water doctrine was created by this Court to correct a perceived oversight on the part of Congress to set aside water to fulfill the purposes of federal land reservations. The doctrine represents this Court's conclusion that, notwithstanding the power the states acquired over their waters as a result of their admission into the Union and various Congressional acts,¹⁰ "Congress did not intend thereby to relinquish its

¹⁰ See, e.g., Act of July 26, 1866 (now codified in 43 U.S.C. § 661); Act of July 9, 1870 (now codified in 43 U.S.C. § 661); and the Desert Land Act of 1877 (now codified in 43 U.S.C. § 321).

authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes." *United States v. New Mexico*, 438 U.S. 696, 698 (1978).

This Court has recognized, however, that the doctrine is clearly an exception to Congress' traditional deference to the states in the control and allocation of water on federal lands. To balance the scales, this Court has defined the analytical rule that must be applied when determining federal reserved water rights so that the doctrine remains a "narrow exception" to that deference. The measure of a federal reserved water right is that *minimal amount of water* necessary to ensure that the *primary purposes* of the *land reservation* are not entirely defeated. *Id.* at 700-702.

In its decision below, the Colorado Supreme Court developed its own rule for quantifying federal reserved water rights.¹¹ The Colorado rule eliminates the land reservation predicate, eliminates the primary purpose limitation, and discounts this Court's directive to minimize the amount of water awarded. Simply stated, the measure of a federal reserved water right, under the Colorado rule, is that amount of water that is no more than necessary to fulfill the purposes of a legislative

¹¹ There is no way to characterize the Colorado Supreme Court's action in the case below as a "logical extension of" or "gloss on" the *New Mexico* rule. The departure from the *New Mexico* rule is so dramatic that it has to be viewed as a separate and distinct rule for quantifying federal reserved water rights.

enactment. The Colorado rule directly conflicts with the *New Mexico* rule and, if left unchecked, will deprive Park Center of its vested water right and transform the implied-reservation-of-water doctrine into nothing more than a broad policy statement that justifies a greatly enlarged set of federal reserved water right claims.

In this case, the Colorado rule effectively emasculates Park Center's decreed water right. Park Center can no longer exercise its water right from the Park Center Well point of diversion. Drastic as that impact is to Park Center, the truly significant aspect of the Colorado rule is that it greatly expands the implied-reservation-of-water doctrine. Such expansion of the doctrine cannot be tolerated because there were, and remain, important policy reasons for this Court's decision to narrowly tailor the amount of water impliedly reserved to only that amount necessary to fulfill the primary purpose of the federal reservation. First, the doctrine is "built on implication and is an exception to Congress' explicit deference to state water law in other areas." *United States v. New Mexico*, 438 U.S. at 715. Second, broad construction of the amount of water impliedly reserved for federal reservations would seriously harm competing private and state claims for limited western water, especially when such "implied reservations" are allowed to relate back to early priority dates. *Id.* at 699. And third, an expansive interpretation of the "implied reservation" would violate separation of powers principles; the judiciary would be rewriting instead of interpreting the legislation. *See, e.g.*, Solicitor's Opinion No. M-36914 (Supp. III) on Federal Reserved Water Rights in Wilderness Areas (July 16, 1988) (herein "Solicitor's Wilderness Opinion") at 24, n. 38.

In short, this Court has, in *New Mexico*, carefully tailored the doctrine to balance competing interests. No deviation from the *New Mexico* rule can be tolerated because to do so would upset that balance and, more importantly, would usurp the Congressional will.¹² The Colorado rule clearly departs from the *New Mexico* rule. It redefines the three critical elements of the *New Mexico* rule (*i.e.*, land reservation predicate, primary purpose, and minimal amount necessary) in such a way that the scales are handsomely tipped in favor of a greatly expanded implied-reservation-of-water doctrine.

Moreover, this is not the first time that the Colorado Supreme Court has shown a tendency to depart from the

¹² Even with this Court's carefully defined rule for determining federal reserved water rights, there is considerable disagreement with regard to the existence and amount of federal reserved water rights for: (a) wilderness areas, compare *Sierra Club v. Lyng*, 661 F. Supp. 1490 (D. Colo. 1987) with Solicitor's Wilderness Opinion; (b) wild and scenic rivers, see Waring and Samelson, *Non-Indian Federal Reserved Water Rights*, 58 Den. L. J. 783, 798-99 (1981); (c) public springs and water holes, compare *United States v. City and County of Denver*, 656 P.2d 1, 31-33 (Colo. 1983) with Liston, *Reevaluating the Applicability of the Reservation Doctrine to Public Water Reserve No. 107*, 26 Ariz. L. Rev. 127 (1984); and (d) national forests, compare *United States v. New Mexico*, 438 U.S. 696 (1978) with *U.S. v. Jesse*, 744 P.2d 491 (Colo. 1987). Additionally, there is some confusion on how to define the "primary purpose" of a land reservation. See, *e.g.*, Elliott, *United States v. New Mexico: Purposes That Hold No Water*, 22 Ariz. L. Rev. 19 (1980). The Colorado rule plainly aggravates these uncertainties since the elements of that rule are considerably broader than the elements of the *New Mexico* rule (*e.g.*, "purposes of the legislative enactment" as opposed to "the primary purposes of the land reservation").

New Mexico rule. In *U.S. v. Jesse*, 744 P.2d 491, 502 (Colo. 1987), the Colorado Supreme Court announced that minimum in-stream flow rights for national forests might be valid reserved water rights if they "further" the primary purposes of the national forest. Such a standard is intolerable because there is no way to constrain it. More water will, arguably, further the primary purposes of all land reservations. Minimum in-stream flows, for example, will further the primary purposes of Indian reservations, national forest reservations, and BLM withdrawals. Indeed, more water would have furthered the primary purpose of Devil's Hole, but this Court limited the right to that minimal amount necessary to ensure that survival of the pupfish – the primary purpose of the withdrawal of that national monument – would not be entirely defeated. *Cappaert v. United States*, 426 U.S. 128 (1976).

Clearly, neither this "furthering" notion, nor the Colorado rule, will be limited to the federal reserved water rights at issue in *Jesse* and the case below. History proves otherwise.¹³ In *Cappaert*, for example, this Court only addressed the quantification of federal reserved water rights for a single Presidential set aside, yet that case has guided the quantification of all sorts of federal reservations, including national forests. See, e.g., *United States v.*

¹³ As explained by one commentator: "Though *United States v. New Mexico* only expressly determined the scope of federal reserved rights in the national forests, its impact will spread to other types of federal reservations, and, indeed, it is in such areas that its reverberations ultimately may echo most loudly." Boles and Elliott, *United States v. New Mexico and the Course of Federal Reserved Water Rights*, 51 U. Colo. L. Rev. 209, 233 (1980).

New Mexico, 438 U.S. at 698-701. Similarly, the United States will argue that the quantification of *all* federal reserved water right claims should be based on the Colorado Supreme Court's announcements in *Jesse* and the case below. That argument opens a very large door for additional federal reserved water right claims, including: (a) instream flows in national forest areas,¹⁴ wilderness areas,¹⁵ and wild and scenic river areas;¹⁶ (b) water requirements for exploration and development of oil shale reserves;¹⁷ (c) water requirements for power development at power site withdrawals;¹⁸ and (d) water requirements for Multiple-Use Sustained-Yield Act purposes, notwithstanding this Court's rejection of such a claim in *New Mexico*.

These federal reserved water right claims are no longer theoretical matters. By expanding the implied-reservation-of-water doctrine, the Colorado Supreme Court has made them real and valid. Indeed, as a result of the *Jesse* opinion, the United States is claiming up to half of the water flowing through national forest reserves in the headwaters areas of northeastern Colorado. Clearly, if the United States is successful in the case, it would have a

¹⁴ See note 12 *supra*.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Boles and Elliott, *United States v. New Mexico and the Course of Federal Reserved Water Rights*, note 13 *supra* at 234, n. 111.

¹⁸ See Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management (M-36914), 86 I.D. 553, 590-91 (1979).

profound effect on millions of acres of federal land throughout the West.¹⁹

The reach of the Colorado rule will not, moreover, be limited to Colorado. The Colorado Supreme Court is generally regarded as the leading authority in water rights cases in the Rocky Mountain West.²⁰ Colorado has pioneered state administration of water rights and has generally been the first to deal with all types of "Colorado Doctrine" water rights issues. As a result, there is a tradition of precedential respect for Colorado decisions. This has occurred with regard to federal reserved water rights issues as well²¹ and is likely to continue since Colorado is generally ahead of the other states in the reserved water rights adjudication process.²² And, as a result of the McCarran Amendment, it is these state courts that will be applying this federal law.²³ Thus, the

¹⁹ See Kerwin, *Courtroom Salvos Fired in Giant Water Fight*, Rocky Mountain News at 10 (January 9, 1990). See also *United States v. New Mexico*, 438 U.S. at 699, n. 3.

²⁰ See, e.g., 1 Clark, *Waters and Water Rights* §§ 20.7, 39.2.

²¹ See, e.g., *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971); *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); and *State v. Confederated Salish & Kootenai*, 712 P.2d 754, 759, 767 (Mont. 1985).

²² The federal reserved water right claims tend to be adjudicated in Colorado first due to the on-going nature of Colorado's adjudication process. See, e.g., Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 Ecology L. Q. 627, 638, 658, n. 177 (1988).

²³ See, e.g., *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

Colorado rule is likely to govern future adjudications throughout the West. At the very least, the Colorado rule will create a tremendous amount of uncertainty with regard to the implied-reservation-of-water doctrine since the Colorado rule differs so dramatically from the *New Mexico* rule. That uncertainty will tend to preclude negotiated settlements of these complicated adjudications²⁴ and foster additional litigation of the issues.

In sum, the Colorado Supreme Court has drifted off course. In light of its status as a leader in federal reserved water rights cases, its rule will tend to govern, or cloud,²⁵ the multitude of federal reserved water right cases that are being, or will be, adjudicated in the West.²⁶ We are, therefore, badly in need of this Court's authoritative

²⁴ See, e.g., Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, note 22 *supra* at 635.

²⁵ Ironically, the Colorado rule puts the cloud back on the implied-reservation-of-water doctrine that *New Mexico* was thought to have dispelled. See Boles and Elliott, *United States v. New Mexico and the Course of Federal Reserved Water Rights*, note 13 *supra* at 230.

²⁶ See, e.g., Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, note 22 *supra* at 627, 635 ("The federal government claims vast quantities of water in connection with the national forests and parks, Indian reservations, and other land holdings in the Western states."). In Colorado alone, records indicate that the United States has filed over 850 claims for federal reserved water rights, the vast majority of which are still pending.

voice in this area of federal law. Without a prompt correction of the Colorado rule in this case, the on-going water rights adjudications in the West will be misguided by a doctrine that is anything but the "narrow exception" that this Court contemplated. Private water users will suffer greatly as this much broader set of federal reserved water right claims "relates back" to priority dates that are senior to their previously decreed water rights.

II. APPLICATION OF THE COLORADO RULE IN THE PARK CENTER WELL CONTEXT DEMONSTRATES THE EXTENDED BREADTH OF FEDERAL RESERVED WATER RIGHT CLAIMS UNDER THAT RULE.

A. The Colorado Rule Eliminates the Land Reservation Predicate for a Federal Reserved Water Right.

Instead of addressing the *land reservation* at issue in the case below, the Colorado Supreme Court explains that the Conversion Act itself provides the necessary predicate for the federal reserved water right. The court's justification for using the Conversion Act itself is its recognition that neither Section 10 of the Stock Raising Homestead Act nor Public Water Reserve No. 107 would support a reserved water right for the entire yield of the Park Center Well. "Nevertheless, the water court decreed that the United States had reserved the entire yield of the Park Center well. The source of the reservation, therefore, must come from the Conversion Act . . . if this case is to be distinguished from *Denver I.*"²⁷ App. 14.

²⁷ *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982) (herein *Denver I.*). In that case, the Colorado

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In its inordinate desire to affirm the water court, the Colorado Supreme Court has overlooked a fundamental element of the implied-reservation-of-water doctrine. In order to have a federal reserved water right there must first be a reservation of land. It is this reservation of land that is then analyzed in determining the amount of water impliedly reserved.

Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the *land* was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.

United States v. New Mexico, 438 U.S. at 700 (footnote omitted) (emphasis added). See also *Id.* at 700, n. 4; Solicitor's Wilderness Opinion at 32, n. 42.

The Conversion Act does not *authorize* the reservation of any land. Instead, the Conversion Act authorizes the purchase of the well casing if, and only if, the land on which the well is situated can be reserved as a public water hole under Section 10 of the Stock Raising Homestead Act. See Conversion Act at subsection (a), App. 52.

In this instance, the reservation of land was accomplished pursuant to Section 10 of the Stock Raising

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Supreme Court held that Section 10 of the Stock Raising Homestead Act and Public Water Reserve No. 107 reserved only that amount of water from public springs and water holes necessary to prevent monopolization of the water resource. *Id.* at 31-33.

Homestead Act. By operation of the Order of Interpretation No. 209 and Public Water Reserve No. 107, the land on which the Park Center Well is situated was set aside as a public water hole. These executive orders, along with the Stock Raising Homestead Act, are the predicate for the federal reserved water right, not the Conversion Act. The primary purpose of this land reservation is "to prevent monopolization of water needed for domestic and stock watering purposes," and this purpose can be satisfied with less than the entire yield of the water hole. *Denver I*, 656 P.2d at 32. Indeed, monopolization of a public water hole can be prevented so long as "no one appropriator has complete control of the resource." *Id.* at 33.

B. The Colorado Rule Expands the Federal Reserved Water Right to Water that is Necessary to Fulfill Non-Primary Purposes.

Since the Colorado Supreme Court refused to focus on the land reservation at issue, it was impossible for the court to articulate the primary purpose of that land reservation. The court compounded this error, however, by failing to identify the primary purpose of the Conversion Act itself. Instead, the court listed two purposes of the Conversion Act,²⁸ but neither of those purposes were

²⁸ The purposes of the Conversion Act listed by the Colorado Supreme Court were: (a) to provide water for beneficial use on reserved land, and private land adjacent to the reserved land on which the converted wells are located; and (b) to sell the water at a reasonable cost and to use the proceeds to convert more wells in the Oil and Gas Conversion program. App. 16.

identified as a primary purpose. Moreover, neither the Conversion Act nor its legislative history²⁹ can support a conclusion that the Conversion Act purposes listed by the Colorado Supreme Court are primary purposes.

The Conversion Act, adopted in 1934, was an amendment to the Mineral Leasing Act of 1920 that was intended to prevent valuable water wells from being plugged. Instead of forcing oil and gas drillers to plug and abandon exploration wells that had intercepted water as was required under leases issued before the amendment, the Conversion Act created a mechanism for keeping the water flowing. The Secretary of Interior was authorized to purchase the well casing if the land on which the well was situated was first reserved as a water hole under Section 10 of the Stock Raising Homestead

²⁹ Despite the recognized ambiguity within the Conversion Act itself, the Colorado Supreme Court declined to speculate as to the meaning of a substantive amendment to the Conversion Act and failed to recognize the historical context in which the Conversion Act was adopted. App. 15-16. This attitude clearly conflicts with this Court's direction in *New Mexico* that a careful and searching examination of the legislative history is required. *United States v. New Mexico*, 438 U.S. at 700, 705-712. Such an examination is demanded because the implied-reservation-of-water doctrine is in derogation of Congressional policy and must, therefore, be applied to ensure that the awarded right is clearly implied and strictly limited to the minimal amount of water necessary for the primary purpose of the land reservation. *Id.* at 707, n. 14, 712-715. In short, a review of the legislative history and the historical context of the Conversion Act is demanded in order to discern the Congressional will. Without this review, the judiciary asserts its own will and usurps the legislative function. See Solicitor's Wilderness Opinion at 24, n. 38.

Act. The water from the well was then to be made available for beneficial use. In particular, the water was to be placed "at the disposal of the farmers and ranchers to be used for the benefit of the public domain." See 1934 Cong. Rec. 11,116-117. All in all, the amendment was "in the nature of an emergency measure for drought relief" in order to aid in the development and settlement of the arid west. *Id.*

Perhaps the best way to put the legislative discussion on the Conversion Act in perspective is to recall that 1930 marks the beginning of the drought that spawned the Dust Bowl era. In 1934, the dust storms were particularly devastating and, although not intended to operate as a comprehensive solution to the problem, the Conversion Act did provide some emergency relief. It created a mechanism for making this new water available to the public. It is inconceivable that the 73rd Congress intended to assert an ownership interest in this water so that it could require these drought-stricken ranchers and farmers to pay for it. To be sure, such a conclusion would be completely inconsistent with the substantial farm subsidies Congress adopted during this New Deal period to help the depressed farm economy.³⁰

³⁰ The status of the farm situation in the 1930s, the Dust Bowl era, and the New Deal legislation are well documented. See, e.g., Schlesinger, Jr., Arthur M., *The Age of Roosevelt - The Coming of the New Deal*, Houghton Mifflin Company, Boston (1959) at 1-86; Lowitt, Richard, *The New Deal and the West*, Indiana University Press, Bloomington (1984) at 8-32. These historical events put the legislative debate in perspective and are clearly pertinent to an interpretation of the Conversion Act.

Indeed, an examination of amendments that were made to the Conversion Act while in committee clearly demonstrate that Congress did not contemplate federal ownership of water from these wells. As introduced, the Conversion Act authorized the Secretary to "lease" or "sell" *water* from the converted oil and gas wells under subsection (c) of the Act (the water disposition provision of the Act). Since an ownership interest is necessary before leases or sales of the water could be made, this language necessarily evidences an intent on the part of the original drafters of the Act that the federal government should have an ownership interest in the water. However, all language in subsection (c) concerning the Secretary's power to sell or lease water from the converted wells was removed and replaced with language requiring disposition for beneficial use.³¹ At the same time, the Stock Raising Homestead Act land reservation proviso was added to subsection (a).³²

³¹ Subsection (c) of the Conversion Act, as introduced and enacted, is set out at App. 58.

³² Admittedly, there is some ambiguity in the Conversion Act as finally adopted due to the word "sale" in subsection (d) of the Act. There are, however, two explanations. First, it is quite likely that the committee simply failed to make the necessary conforming change to subsection (d) when it modified the Act as introduced. Alternatively, the "sale or other disposition" language in subsection (d) can be read in the context of the two purposes for which subsection (c) allows these wells to be leased or operated. That is, subsection (c) allows the water to be "used" on public land or "disposed of" for beneficial use on other land. "Sale" in subsection (d), therefore, refers to the sale of water from the wells that the

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Despite the recorded legislative debate, the historical backdrop, and the committee amendments, the Colorado Supreme Court determined that Congress had something entirely different in mind. In essence, the court found that Congress intended in this instance: (a) to reject the deference historically given to state control of water allocation and assert an ownership interest in the water flowing from converted oil and gas wells, (b) to treat that water as a commodity, and (c) to sell or lease that water to farmers and ranchers in the arid West. This is truly an incredible proposition.³³ The Conversion Act was intended to

(Continued from previous page)

federal government actually appropriates and puts to use on public lands. "Other disposition" in subsection (d) refers to the primary purpose of the casing purchases – to make water from these wells available for beneficial use by farmers and ranchers.

In any event, the use of the single word "sale" in subsection (d) of the Act cannot be interpreted to displace the specific deletion of the terms "lease" and "sale" in the provision of the Act that deals with disposition of the water. Nor can it be viewed as the kernel that provides the basis for a water right that is in derogation of Congress' traditional deference to state laws in water allocation. In this instance, the tenor of the entire legislative discussion is one of making the water available for beneficial use in the arid Western states and not one of asserting an ownership interest in the water so that the water from the wells could later be leased or sold to farmers and ranchers.

³³ Moreover, such a conclusion is inconsistent with contemporaneous thinking. At the time the Conversion Act was adopted, the Desert Land Act of 1877 was viewed as having effected a severance of all non-navigable water from the public domain with one exception – waters on Indian land. See Trelease, *Reserved Water Rights Since PLLRC*, 54 Den. L. J. 473, 475

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provide an "emergency measure for drought relief" by converting oil and gas wells that had intercepted water, and then making that water available for beneficial use by the general public. In order to compensate the owners of the oil and gas wells that were being converted, Congress authorized purchase of the casings. In order to defray the cost of such purchase, leasing of the wells was authorized.³⁴ And, in order to prevent private monopolization of the water from these converted wells, Congress

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(1977); Solicitor's Wilderness Opinion at 4. See also *United States v. New Mexico*, 438 U.S. at 703, n. 7. Non-navigable waters on non-Indian lands, however, were not owned by the United States. They were *publici juris*, subject to the plenary control of the states. See *California Oregon Power Co. v. Beaver Portland Cement*, 295 U.S. 142, 157-58, 163-64 (1935). This understanding was made quite explicit with regard to Conversion Act wells in a 1937 Solicitor's Opinion. In that Opinion, the Solicitor concluded that the federal government had to apply pursuant to state law for the use of the water from such wells. Solicitor's Opinion No. M-28853 (July 20, 1937). App. 59.

³⁴ Both the United States and the courts below have confused the interrelationship between the Park Center Well and the claimed water rights to water flowing from that well. The well structure is property that is separate and distinct from the water rights. The well, which Park Center has always conceded is owned by the United States, is nothing more than a diversion point. Clearly, more than one water right can be exercised at a single well structure unless, as determined in the case below, the senior water right is for the entire yield of the well. However, if the United States is limited to the amount of water available under the *New Mexico* rule (i.e., that minimal amount of water necessary to prevent monopolization), both its water right and Park Center's water right could be diverted from the Park Center Well.

required the land on which the well was situated to be reserved under the authority of the Stock Raising Homestead Act.

C. The Colorado Rule Eliminates the Minimal Amount Necessary Criteria.

Again, because the Colorado Supreme Court failed to tie the water right to the land reservation, and the primary purpose of that land reservation, it was impossible for the court to define the minimal amount necessary to ensure that such primary purpose is not entirely defeated. The court's failure to apply the "minimal amount necessary" criteria to the purposes of the Conversion Act that it identified further aggravates this error. As explained by this Court, strict application of this particular criteria is critical since, due to the relative scarcity of water in the West, the awarded reserved water right generally results in a gallon-for-gallon reduction of private water rights that have previously been decreed under state law. *United States v. New Mexico*, 438 U.S. at 705.

In place of the minimal amount necessary analysis, the Colorado Supreme Court explained that it was reasonable to assume that "the United States took into account the quantity of water flowing from the well under artesian pressure" when it elected to purchase the casing. On the basis of that assumption, the court declined to overturn the water court's finding "that the United States intended to *lease*, and therefore reserve, the entire flow from the well," which is "no more than the

amount of water needed to fulfill the purpose" of the Conversion Act. App. 17. (Emphasis added).

There is, however, no demonstration that the original assumption is justified. Nor is there any indication that the entire yield of the Park Center Well had to be leased in order for the United States to generate enough money to create a fund for other casing purchases. There is, in short, no evaluation of whether some amount of water less than the entire yield would entirely defeat the identified purposes. More importantly, "leasing" the water, which is the Colorado Supreme Court's purported basis for a reservation of the entire flow, is never identified by that same court as one of the purposes of the Conversion Act.³⁵

Application of the Colorado rule in the Park Center Well context highlights its impact on water resources in the West. Instead of limiting the federal reserved water right to that minimal amount necessary to prevent monopolization of the resource, the Colorado Supreme Court awarded a right to the entire resource. It takes little

³⁵ See note 28 and accompanying text *supra*. Ironically, the Colorado Supreme Court's analysis results in the award of a federal reserved water right that tends to defeat the major objective of the Conversion Act – to make this water available to drought stricken farmers. Reservation of the entire flow precludes appropriation of that water by these same farmers. Cf. *United States v. New Mexico*, 438 U.S. at 715 (a reservation of additional water for Multiple-Use Sustained-Yield Act purposes could mean a substantial loss in the amount of water available for irrigation and domestic use, "thereby defeating Congress' principal purpose of securing favorable conditions of water flow.").

imagination to forecast the future under the Colorado rule. Federal reserved water rights will be claimed for all legislative purposes (primary or not) that will be "furthered" by some protected level of water supply. This cannot be tolerated. This Court must quickly rein in the Colorado Supreme Court to ensure that the "narrow exception" to Congress' deference to state water laws does not entirely swallow that deference.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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January 19, 1990



App. 1

APPENDIX A

PARK CENTER WATER DISTRICT,
Objector-Appellant,

v.

UNITED STATES of America,
Applicant-Appellee,

and

State of Colorado, Objector-Appellee,

and

Division Engineer, Water Division
No. 2, Appellee.

No. 88SA199.

Supreme Court of Colorado,
En Banc.

Oct. 23, 1989.

Vranesh and Raisch, Eugene J. Riordan and Brian M. Nazarenus, Boulder, for objector-appellant.

Michael J. Norton, U.S. Atty., Robert J. Marzulla, Asst. Atty. Gen., and John R. Hill, Jr., Atty., Dept. of Justice, Denver, and Dirk D. Snel and Robert L. Klarquist, Attys., Appellate Section Land & Natural Resources Div., Dept. of Justice, Washington, D.C., for applicant-appellee.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., and Carol D. Angel, Asst. Atty. Gen., Natural Resources Section, Denver, for objector-appellee and appellee.

Justice ERICKSON delivered the Opinion of the Court.

App. 2

This is an appeal¹ from a decision of the District Court, Water Division 2² (water court), awarding the United States a reserved water right to the entire flow of water from the Park Center well (the well), with a priority date of May 29, 1936. Appellant Park Center Water District (Park Center) objected to the United States application on the basis of a decree entered by the water court in April 1973. The water court held that the United States was not bound by the 1973 decree, and that Park Center was collaterally estopped from contesting the application of the United States by virtue of the decision of the Interior Board of Land Appeals (IBLA) in 1977 involving Park Center and the United States. Alternatively, the water court found that Park Center was estopped by contract from objecting to the reserved water rights of the United States because of a series of leases between the parties concerning the well. Finally, the water court ruled that the United States had reserved the entire output of the well under the federal reservation of water rights doctrine, and that the reservation antedated any right to the water held by Park Center. Park Center appealed. We affirm.

I.

The essential facts are not in dispute. The Park Center well is located in the watershed of Fourmile Creek, a

¹ See Colo. Const. art. VI, § 2(2); § 13-4-102(1)(d), 6A C.R.S. (1987); C.A.R. 1(a)(2).

² Water Division 2 "consists of all lands in the state of Colorado in the drainage basins of the Arkansas river and Dry Cimarron river, and streams tributary to said rivers." § 37-92-201(1)(b), 15 C.R.S. (1973).

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tributary of the Arkansas River, in Fremont County. The well was originally drilled by the Mutual Oil and Development Company as an exploratory oil and gas well on public land in the 1920s, under the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-193 (1982). The well never struck oil or gas, but it did intercept water under artesian pressure.

Before the well was plugged, the Mineral Leasing Act was amended by the Oil and Gas Conversion Act of 1934 (Conversion Act), 48 Stat. 977, 30 U.S.C. 229a (amended 1976).³

³ The Conversion Act, ch. 557, 48 Stat. 977 (1934) (amended 1976) provided in relevant part:

(a) All prospecting permits and leases for oil or gas made or issued under the provisions of this [Mineral Lands Leasing] Act [of 1920] shall be subject to the condition that in case the permittee or lessee strikes water while drilling instead of oil or gas, the Secretary of the Interior may, when such water is of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, purchase the casing in the well at the reasonable value thereof to be fixed under rules and regulations to be prescribed by the Secretary: *Provided*, That the land on which such well is situated shall be reserved as a water hole under section 10 of the Act of December 29, 1916.

(b) In cases where water wells producing such water have heretofore been or may hereafter be drilled upon lands embraced in any prospecting permit or lease heretofore issued under the Act of February 25, 1920, as amended, the Secretary may in like manner purchase the casing in such wells.

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The well was completed as a water-producing well to a depth of 3,216 feet. On September 27, 1934, a forty acre legal subdivision containing the well was withdrawn from the public domain pursuant to Executive Order of Withdrawal dated April 17, 1926 (also known as Public Water Reserve No. 107). The authority for the executive

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(c) The Secretary may make such purchase and may lease or operate such wells for the purpose of producing water and of using the same on the public lands or of disposing of such water for beneficial use on other lands, and where such wells have heretofore been plugged or abandoned or where such wells have been drilled prior to the issuance of any permit or lease by persons not in privity with the permittee or lessee, the Secretary may develop the same for the purposes of this section: *Provided*, That owners or occupants of lands adjacent to those upon which such water wells may be developed shall have a preference right to make beneficial use of such water.

(d) The Secretary may use so much of any funds available for the plugging of wells, as he may find necessary to start the program provided for by this section, and thereafter he may use the proceeds from the sale or other disposition of such water as a revolving fund for the continuation of such program, and such proceeds are hereby appropriated for such purpose.

The Conversion Act was amended in 1976 by Pub.L. 94-579, 90 Stat. 2792 (1976). The amendment struck out the final proviso of subsection (a) relating to the reservation of the land "as a water hole under section 10 of the Act of December 29, 1916." Section 10 of the Act of December 29, 1916, was section 10 of the Stock Raising Homestead Act, 43 U.S.C. § 300 (repealed 1976).

App. 5

order was section 10 of the Stock Raising Homestead Act, 43 U.S.C. § 300 (repealed 1976). See *United States v. City & County of Denver*, 656 P.2d 1, 31 n. 47 (Colo. 1982) [hereinafter *Denver I*].

In June 1935, the artesian water flow from the well was measured at 2.67 cubic feet per second (cfs). The casing of the well was purchased by the United States in 1936 under the provisions of the Conversion Act. Since 1937, Park Center and its predecessor, Canyon Heights Irrigation and Reservoir Company (Canyon Heights), have used the water from the well under a series of leases with the United States.⁴ Each such lease, including the current twenty-year lease which commenced in 1971, has stated, "The furnishing of water hereunder shall under no circumstances become the basis of a permanent water right."

II.

Park Center and Canyon Heights filed an application in 1972 in the water court for a water right to the water from the Park Center well. See § 37-92-302, 15 C.R.S. (1973). In 1973, the water court awarded Park Center a water right for 708 gallons per minute (1.58 cfs) for domestic and irrigation purposes, with a priority date of

⁴ The water court found that the water from the well has never been beneficially used by anyone other than Park Center or Canyon Heights. From 1937 to 1968, water from the well was used for irrigation. In 1969, the water was used for both irrigation and domestic purposes, serving about 100 households. Presently, the water is used exclusively by Park Center for domestic purposes, serving 753 households.

January 8, 1938. The United States was not joined as a party, and did not object to the application or award.

In a separate proceeding in 1976, Park Center and Canyon Heights appealed to the IBLA from an adverse decision of the Colorado State Office of the Bureau of Land Management (BLM). The decision awarded the United States an increase under the lease from two cents per thousand gallons of water used by Park Center from the well, to six cents.⁵ The IBLA affirmed the decision of

⁵ In its statement for reasons of appeal, Park Center raised the following grounds, *inter alia*:

1. That said decision is arbitrary and capricious in that such increase in water rates is unrelated to any defined or ascertainable standard of value and, further, constitutes an unreasonable and unjustifiable increase based upon the *reasonable value and prices for untreated water paid by other water users in the State of Colorado and, more particularly, in Fremont County, Colorado, which is where the water well in question is located.*

. . . .

7. That under a recent United States Supreme Court case, namely *Akins vs. The United States and the Colorado River Water Conservation District*, it has been determined that waters located upon Federal lands are subject to the laws of the several states in which they are located and to the jurisdiction of the courts of such states to determine water rights thereon and that pursuant to Colorado law [Park Center and Canyon Heights] have heretofore applied for and obtained an under ground water right for the water available from said water well and that therefore [Park Center and Canyon Heights] are entitled to the continued use of the water available from said water

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App. 7

the BLM. *Park Center Water Dist. & Canyon Heights Irrigation & Reservoir Co.*, 84 Interior Dec. 87 (1979). The opinion stated that "[the Park Center] well and its water are withdrawn from any other disposition, including the attempted disposition under state law. . . . Finally, [Park Center and Canyon Heights] are estopped by contract from asserting any sort of permanent water right against the United States." *Id.* at 91.⁶

The United States was joined in May 1979 as a party in Case No. 79CW176 in Water Division 2, pursuant to the McCarran Amendment.⁷ It filed a general application for

(Continued from previous page)

well and the Bureau of Land Management is, by law, barred from the right to increase or impose additional water rates for the use of said water by [Park Center and Canyon Heights].

(Emphasis added.) Nevertheless, Park Center maintained in the water court, and it renewed the argument before this court, that the lease between Park Center and the United States was for access to the well only, and not for the use of water. In addition, Park Center claims that the issue of the right to the water from the well was not before the IBLA.

⁶ Park Center did not seek judicial review of the IBLA decision, although it could have, *Shell Oil Co. v. Kleppe*, 426 F.Supp. 894, 897 (D.Colo. 1977), *aff'd sub. nom. Shell Oil Co. v. Andrus*, 591 F.2d 597 (10th Cir. 1979), *aff'd*, 446 U.S. 657, 100 S.Ct. 1932, 64 L.Ed.2d 593 (1980). The decision is now final and no longer subject to judicial review. See *Heritage Pullman Bank & Trust Co. v. United States*, 480 F.Supp. 54, 57 (N.D.Ill.1979).

⁷ 43 U.S.C. § 666 (1982). "The McCarran Amendment waives United States sovereign immunity should the United States be joined as a party in a state-court general water rights' adjudication, . . ." *Cappaert v. United States*, 426 U.S. 128, 146, 96 S.Ct. 2062, 2073, 43 L.Ed.2d 523 (1976).

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federal reserved water rights, and state appropriative water rights, in December 1979, claiming, *inter alia*:

the entire flow of wells drilled pursuant to oil and gas prospecting permits or leases which produce water and which have been determined to be valuable for water production by the Secretary of the Interior, purchased pursuant to 30 USC 229, and the land subdivision containing the well withdrawn and reserved for public use.

The sources of this claim were described as "all springs, wells, waterholes and other bodies of water located within the boundaries of this Water Division which are needed or used by the public for watering purposes and which are located on the lands described in the applicable reserving documents."

The application addressed section 37-92-306, 15 C.R.S. (1973),⁸ and stated that the United States was filing

⁸ Section 37-92-306 provides, in part:

Priorities junior to prior awards – when. With respect to each division described in section 37-92-201, the priority date awarded for water rights or conditional water rights adjudged and decreed on applications for a determination of the amount and priority thereof filed in such division during each calendar year shall establish the relative priority among other water rights or conditional water rights awarded on such applications filed in that calendar year; *but such water rights or conditional water rights shall be junior to all water rights or conditional water rights awarded on such applications filed in any previous calendar year. . . .*

(Emphasis added.)

the general application in the same year in which it had first been joined in a general water rights adjudication in Water Division 2, in order to preserve the right to antedation.⁹ The 1979 application also purported to reserve the right of the United States to amend the application "for specific water rights of the United States which are described generally in paragraph 5, above, and will be filed by agency [sic] as the applications are completed."

⁹ "Antedation" allows the award of an earlier priority date than the postponement doctrine would permit. *United States v. Bell*, 724 P.2d 631, 635 n.6 (Colo.1986). Under the postponement doctrine, the date of appropriation determines the relative priorities among applicants for water rights within a calendar year. The priorities of all water rights decreed within a calendar year, however, are junior to the priorities of water rights decreed in earlier calendar years. § 37-92-306; *Bell*, 724 P.2d at 641-42.

"Priority" is defined as the seniority by date as of which a water right is entitled to use or conditional water right will be entitled to use and the relative seniority of a water right or a conditional water right in relation to other water rights and conditional water rights deriving their supply from a common source.

Section 37-92-103(10), 15 C.R.S. (1973). In this case, the United States would be eligible for antedation only because it was privileged from joinder in earlier years prior to the McCarran Amendment. *Bell*, 724 P.2d at 642. Once properly joined, the United States may obtain a decree for a water right with an earlier date than the postponement doctrine would otherwise allow. *Id.* If, however, the United States does not seek an adjudication of a specific water right within the calendar year in which it is first properly joined, the United States is subject to the postponement doctrine. *Id.* at 645.

The United States claimed that the reason for delay in filing specific applications was the large number of water rights involved, and a lack of time and manpower. In December 1980, the water court entered an order for the assignment of new case numbers for the subsequent specific applications of the United States. The water court ruled in September 1981, however, in Case No. 79CW176, that "[i]n the interest of fairness," and because of the "very complicated" nature of the case, it had permitted the procedure whereby the United States had amended the 1979 application by more specific filings. Subsequently, in October 1981, the water court held that the applications filed by the United States in the renumbered cases would be considered amendments to the original general application filed in 1979, and that these amendments would relate back to the time of the filing of that first application.¹⁰

Finally, on November 29, 1981 (within the March 31, 1982 cutoff date for amendments imposed by the water court), the United States filed the application which specifically claimed federal reserved rights in the Park Center well, for 2.67 cfs of water, with a priority date of May 29, 1936. Various parties, including Park Center, filed objections to the application of the United States for reserved water rights in the well.

¹⁰ The water court found that the subsequent applications were merely amendments to the original application, so that the court had the authority to allow them to relate back to the 1979 application. In addition, the water court concluded that it had "the inherent power to adjust procedures to fit this unique case and its amendments."

By decision dated May 7, 1988, the water court awarded the United States a right to the water from the Park Center well. It rejected Park Center's claim that the United States was bound by the 1973 decree obtained by Park Center without the joinder of the United States.¹¹ Instead, the water court held that Park Center was collaterally estopped from contesting the reserved water rights of the United States in the well because of the unappealed IBLA decision. In addition, the water court found, on the merits, that the United States had reserved 2.67 cfs of water from the well. Finally, the United States was held entitled to antedation, with a May 29, 1936 date of priority.¹² Park Center was precluded from contesting the priority of the United States by virtue of the terms of its lease. Only Park Center appealed the ruling of the water court.

III.

Both Park Center and the United States agree that *Denver I* provides the analytical foundation for determining the scope of the federal reserved water right in this

¹¹ On this appeal, Park Center does not contest the holding of the water court that the United States was not bound by the 1973 decree.

¹² Because the water court found that the United States was entitled to antedation, the date of priority would normally be the date the property containing the reserved water was withdrawn or reserved, September 27, 1934. *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976); *Denver I*, 656 P.2d at 30. May 29, 1936 was the priority date the United States asked for in its application, and the United States agreed to accept that date to avoid republication.

case.¹³ That doctrine was set forth by the United States Supreme Court in *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976):

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV., § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves,

¹³ Because the parties agree that *Denver I* controls the scope of the federal reserved water rights, and since the case was argued in the water court and this court on that basis, we assume for purposes of this appeal, but do not decide, that the doctrine of federal reserved water rights applies to ground water in the same way as it does to surface water. Cf. *Cappaert*, 426 U.S. at 142-43, 96 S.Ct. at 2071-72. But see *In re Rights to Use Water in Big Horn River*, 753 P.2d 76, 99-100 (Wyo.1988), *aff'd by an equally divided Court sub nom. Wyoming v. United States*, ___ U.S. ___, 109 S.Ct. 2994, 106 L.Ed.2d 342 (1989).

In addition, because we affirm the decision of the water court on the merits, it is not necessary for us to address the alternative basis of that decision, that Park Center is collaterally estopped from contesting the right of the United States to use the water. Accordingly, we express no opinion whether or not the doctrine of collateral estoppel was properly applied by the water court.

encompassing water rights in navigable and nonnavigable streams.

Following the decisions of the United States Supreme Court in *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978); *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978); and *Cappaert*, 426 U.S. 128, 96 S.Ct. 2062, we set out the following test for determining the scope of federal reserved water rights:

For each federal claim of a reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water – the minimal need as set forth in *Cappaert* and *New Mexico* – required for such purposes.

Denver I, 656 P.2d at 20.

The specific documents authorizing the reservation and the legislation authorizing the reservation are Public Water Reserve No. 107,¹⁴ section 10 of the Stock Raising

¹⁴ The executive order, Public Water Reserve No. 107, provides:

Every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or waterhole and all land within one quarter of a mile of every spring or waterhole, located on unsurveyed public land, be

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Homestead Act,¹⁵ and the Conversion Act. We have previously held that neither the executive order, nor section 10 of the Stock Raising Homestead Act reserved the entire yield of water from springs or waterholes on withdrawn land:

The federal government's assertion, therefore, that the entire yield must be reserved is not well-founded. The purpose of the reservation was to prevent monopolization of water needed for domestic and stock watering purposes. The water court correctly ruled that the federal purposes could be satisfied with a quantifiable amount less than the entire yield of the springs and waterholes. The reserved rights doctrine only takes that amount of water "necessary to fulfill the purpose of the reservation, no more." [*Cappaert*,] 426 U.S. at 141, 96 S.Ct. at 2070. Here, as the water court found, the necessary amount is less than the entire yield. Reserved water from public springs and waterholes is available for the purposes of human and animal consumption in the amount necessary to prevent monopolization of the water resources.

Denver I, 656 P.2d at 32. Nevertheless, the water court decreed that the United States had reserved the entire yield of the Park Center well. The source of the reservation, therefore, must come from the Conversion Act (not at issue in *Denver I*), if this case is to be distinguished from *Denver I*. We have not considered the Conversion

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and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the [Stock Raising Homestead Act].

¹⁵ 43 U.S.C. § 300 (repealed 1976).

Act before, and we must have not found any reported judicial decision in any other jurisdiction which has construed the Act.

The relevant portions of the Conversion Act are set out in full in footnote 3. Unlike the reservation documents in *Denver I*, the Conversion Act deals expressly with the production and leasing of water from wells. For example, subsection (a) provides that "the Secretary of the Interior may, *when such water is of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes,*" purchase the well casing for a reasonable value. Subsection (c) states that "[t]he Secretary may make such purchase and may *lease or operate such wells for the purpose of producing water and of using the same on the public lands or of disposing of such water for beneficial use on other lands.*" Subsection (c) also makes it clear that the owners or occupants of lands adjacent to the well are given a preferential right to the beneficial use of the water.

Finally, subsection (d) explicitly contemplates that the *water* from the wells be sold to fund the continuation of the program initiated by the Conversion Act: "[T]he [Secretary of the Interior] may use the proceeds from the *sale or other disposition of such water* as a revolving fund for the continuation of such program. . . ." ¹⁶

¹⁶ Park Center argues that the deletion by Congress of certain references to the leasing or sale of water from subsection (c) of the Conversion Act, by means of amendments to the Act while it was in committee, evidence that Congress never intended the United States to have an ownership interest in water produced by the well. We have noted before that "legislative silence may mean many things." *Bell*, 724 P.2d at 637.

We therefore agree with the water court in the conclusion that the United States, by virtue of the Conversion Act, reserved the right to the use of water flowing from the converted wells.¹⁷ One purpose of the reservation, as it appears from the Conversion Act, was to provide water for beneficial use on reserved land, and private land adjacent to the reserved land on which the converted wells are located. Another purpose, however, was to sell the water at a reasonable cost and to use the proceeds to convert more wells for the program. Unlike the Stock Raising Homestead Act, the purposes of the Conversion Act go beyond preventing the monopolization of water from waterholes. Cf. *Denver I*, 656 P.2d at 32.¹⁸

Finally, we must "determine the precise quantity of water – the minimal need as set forth in *Cappaert* and *New Mexico* – required for such purposes." *Denver I*, 656 P.2d

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The reference to the sale or leasing of water was not deleted from subsection (d) of the Conversion Act. We decline to speculate as to the meaning of the amendment of subsection (c) while in committee, since subsection (d) expressly refers to the sale or lease of water.

¹⁷ We also agree with the water court that it is unnecessary to decide whether the reservation of the water was explicit or implied. Compare *Cappaert*, 426 U.S. 128, 96 S.Ct. 2062 (express reservation of water) with *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012 (implied reservation).

¹⁸ As the United States points out, this conclusion is buttressed by contemporaneous regulations issued by the Secretary of the Interior which provide for the leasing of water from Conversion Act wells, in addition to the leasing of the premises. See 30 C.F.R. Part 241 (1939).

at 20. In June 1935, a year before the well casing was purchased in 1936, the artesian water flow from the well was measured at 2.67 cfs, the same amount the water court found was reserved. The Conversion Act authorized the Secretary to purchase the well casing only if "such water is of such quality and *quantity* as to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, . . ." (Emphasis added.) It is reasonable to assume that, before deciding to purchase the well casing, the United States took into account the quantity of water flowing from the well under artesian pressure. We therefore decline to overturn the water court's finding that the United States intended to lease, and therefore reserve, the entire flow from the well, and that the amount of water flow measured in 1935, prior to the purchase, and prior to the lease to Park Center or Canyon Heights in 1937, is no more than the amount of water needed to fulfill the purpose of the reservation.¹⁹ Accordingly, we agree with the water court's determination that the United States has reserved a right to 2.67 cfs of water from the Park Center well.

IV.

The last issue is whether the United States is entitled to antedation of its reserved water right in the well. Antedation is appropriate only if the specific application

¹⁹ Before the water court, and before ~~this~~ court, the United States has represented that it seeks a right to use only the amount of water produced by artesian pressure, and does not claim that it can increase the flow from the well by artificial means, such as pumping, and have the increased flow relate back to the original reservation.

for the use of the water from the Park Center well related back to the original application filed by the United States in 1979, the year in which it was first joined in a general adjudication of water rights that would encompass the Park Center well. See *Bell*, 724 P.2d at 642. Park Center contends that our decision in *Bell* forecloses the relation back of the specific amendments in this case. We disagree because we find *Bell* distinguishable.

In *Bell*, the United States claimed a right to antedation for a right to use the water from the main stem of the Colorado River. We first held that the water court had properly ruled that C.R.C.P. 15 applied to the adjudication of water court proceedings under the Water Right Determination and Administration Act of 1969, sections 37-92-101 to -602, 15 C.R.S. (1973 & 1988 Supp.). The water court had determined that amendment of the original application of the United States filed in 1971 was proper, and we agreed. *Bell*, 724 P.2d at 637. But the water court also refused to allow the amendment filed in 1983 to relate back under C.R.C.P. 15(c)²⁰ to the original

²⁰ C.R.C.P. 15(c) provides, in pertinent part:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment: (1) Has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the

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application filed twelve years before. We concluded that the original application, which did not geographically encompass the mainstem of the Colorado River, did not adequately advise the holders of 4400 water rights, based on claims adjudicated between 1971 and 1983, that the United States was claiming a right to the use of water from the Colorado River itself. *Bell*, 724 P.2d at 639.

In the present case, Park Center is not seriously contending that it was not put on notice of the potential claim of the United States in the Park Center well when the United States filed the original application in 1979.²¹ Rather, Park Center maintains that, when 1980 came and went, and there was no specific application by the United States for a reserved water right to the well, it was justified in concluding that the United States would not claim such a right. This case, therefore, does not present the same unsettling of prior adjudications of water rights as did *Bell*. We conclude that, under the unique facts and circumstances of this case, the water court did not abuse its discretion in allowing the United States to amend its more general application by a specific application to a reserved water right in the Park Center well, and to allow that amendment to relate back.²²

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merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

²¹ Park Center was a party to the prior IBLA proceedings, and did have a lease with the United States pertaining to the well.

²² We thus do not reach the question of whether Park Center is estopped by the terms of its lease from claiming a water right in the well, and we express no opinion thereon.

V.

In summary, we affirm the holding of the water court that the United States is entitled to a reserved water right of 2.67 cfs from the Park Center well. In addition, we also affirm the finding of the water court that the priority date of this water right is May 29, 1936.²³

²³ See footnote 12.

APPENDIX B

DISTRICT COURT, WATER DIVISION NO. 2, STATE OF COLORADO.

CASE NO. 81CW192

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE UNITED STATES OF AMERICA IN FREMONT COUNTY

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

THIS MATTER came before the court for entry of Findings of Fact, Conclusions of Law and Decree. The court, having read the briefs, heard the arguments of counsel, examined the records and files herein, and being now fully and sufficiently advised in the premises, hereby makes the following Findings of Fact, Conclusions of Law and Decree:

FINDINGS OF FACT

1. This is an application by the United States for reserved rights in the Park Center Well.

The Parties

2. The applicant, United States of America, was represented by John R. Hill, Jr., of the Department of Justice, Land and Natural Resources Division, Objector, the State of Colorado, by Assistant Attorney General Carol D. Angel and the Objector, Park Center Water District by Eugene J. Riordan of Vranesh and Raisch.

History of the Park Center Well

3. Park Center Well is in the watershed of Fourmile Creek a tributary of the Arkansas River in Fremont County.
4. The Park Center Well was drilled as an exploratory well for oil and gas under the Mineral Leasing Act of 1920, 30 U.S.C. §§181 *et seq.* The well never struck oil or gas but instead intercepted water under artesian pressure.
5. The Park Center Well was completed to a depth of 3,216 feet as a water producing well. The casing of the well was purchased by the United States in 1936 under the provisions of the Act of June 16, 1934, 48 Stat. 977, 30 U.S.C. 229a; and the land on which such well was situated (SW1/4 of the SW1/4 of Section 34, T 17 S, R 70 W, 6th P.M. in Fremont County, Colorado) was withdrawn on September 27, 1934, pursuant to Order of Interpretation No. 209 and the Executive Order of Withdrawal dated April 17, 1926, a/k/a/ Public Water Reserve No. 107.
6. In June, 1935, the artesian flow of water from the well was measured at 2.67 cubic feet per second.
7. Park Center Water District leases water from the United States from the Park Center Well.
8. Every lease of water from the United States to Objectors Park Center Water District and Canyon Heights Irrigation Company, including a lease which became effective on July 1, 1971, for a term of 20 years, has contained the following provision:

The furnishing of water hereunder shall under no circumstances become the basis of a permanent water right.

9. On June 14, 1972, Park Center Water District and Canyon Heights Irrigation and Reservoir Company filed an application in this court for a water right in the Canyon Heights-Park Center Well which is the same well involved in this case. This court, on April 24, 1973, in Case No. W-1499, entered a decree awarding a water right to Park Center Water District in the Canyon Heights-Park Center Well for 708 gpm for domestic and irrigation with a priority date of January 8, 1938.

10. Park Center Water District and the Canon Heights Irrigation Company appealed a February 24, 1976, decision of the Colorado State Office of the Bureau of Land Management increasing the charges for water leased to Park Center to the Interior Board of Land Appeals (IBLA). *Park Center Water District and the Canon Heights Irrigation and Reservoir Company*, 28 IBLA 368, 84 I.D. 87 (1977). Park Center asserted that the Bureau of Land Management decision was arbitrary and capricious for two reasons: 1) there was no justification for the increased costs, and 2) Park Center and Canon Heights had obtained a decree from this court in Case No. W-1499 granting it the right to use the waters of Park Center Well and that the BLM was barred by law from increasing or imposing additional water rates. 84 I.D. at 88; Exhibit A to Park Center Water District's Answer Brief on the Issue of Collateral Estoppel.

11. The IBLA affirmed the decision of the BLM and held inter alia that:

[The Park Center] well and its water are withdrawn from any other disposition, including the attempted disposition under state law . . . the appellants are estopped by contract from asserting any sort of permanent water right against the United States.

84 I.D. at 91.

12. Water flowing from the Park Center Well is not presently and has never been beneficially used upon the land withdrawn from public entry pursuant to Public Water Reserve No. 107.

13. Water flowing from the Park Center Well is not presently and has never been beneficially used for human drinking or stock watering by owners or operators of stock raising homesteads patented under the Stock Raising Homestead Act.

14. Water flowing from the Park Center Well is not presently and has never been beneficially used upon any other public lands or federally reserved or withdrawn lands.

15. Water flowing from the Park Center Well is not presently and has never been beneficially used by anyone other than Park Center or the Canyon Heights Irrigation and Reservoir Company.

16. From 1937 until 1968, the waters of Park Center Well were used to supplement the Canon Heights Ditch which irrigates 832 acres of land in section 8, 9, 10, 15, 16, 17, 20, 21, 22, 23 and 26 of T.18S., R.70W., of the 6th P.M. In 1969, water from the well was used for both irrigation and domestic purposes, with the domestic system serving about 100 households. Currently, water from the well is

used exclusively for domestic purposes by the Park Center Water District, serving 753 households.

17. The amount of water claimed in this case is sufficient to irrigate 66.75 acres. (Stipulation between the United States of America and the State of Colorado).

The Application of the United States

18. The United States was joined as a party in Water Division No. 2 in May, 1979. On December 20, 1979, the United States filed an application for water rights which was assigned Case No. 79CW176. That application acknowledged service of the resume upon the United States. In paragraph 3 of that Application, the United States acknowledged §37-92-306 C.R.S. 1973 and stated that the Application was being filed within the calendar year in which it was served in order to preserve its claim to antedation. The United States reserved the right to amend the application because of the large number of water rights belonging to the United States and because of time and manpower constraints.

19. The application in Case No. 79CW176 included, among many others, the following claim

the entire flow of wells drilled pursuant to oil and gas prospecting permits or leases which produce water and which have been determined to be valuable for water production by the Secretary of the Interior, purchased pursuant to 30 USC 229, and the land subdivision containing the well withdrawn and reserved for public use.

20. The sources covered by this claim were

all springs, wells, waterholes and other bodies of water located within the boundaries of this Water Division which are needed or used by the public for watering purposes and which are located on the lands described in the applicable reserving documents.

21. The priority dates claimed were the dates the lands were reserved from the public domain.

22. The application concluded with the following statement:

The United States of America will file a series of amendments to this application during 1980. These amendments will consist of the applications for the specific water rights of the United States which are described generally in paragraph 5, above, and will be filed by agency as the applications are completed.

23. On December 9, 1980, the court entered an Administrative Order providing for assignment of new case numbers and collection of filing fees for applications of the United States relative to Case No. 79CW176.

24. On September 8, 1981, the court heard arguments on a motion filed by certain objectors to consolidate Case No. 79CW176 with all subsequently filed cases for purposes of Statements of Opposition. Notice was given to all objectors in Case No. 79CW176. In an order in Case No. 79CW176 entered September 16, 1981, *nunc pro tunc* September 8, 1981, the court made the following findings:

1. It is recognized that when the UNITED STATES OF AMERICA commenced filing for water rights pursuant to its application in Case 79CW176, the UNITED STATES OF AMERICA was faced with a very complicated case relating to its water rights which, in the court's opinion,

the Water Rights Determination and Administration Act of 1969 did not contemplate.

2. In the interest of fairness to the UNITED STATES OF AMERICA, since jurisdiction over it has been acquired and since it has filed the application in Case 79CW176, this court has permitted the procedure which the UNITED STATES OF AMERICA has used in its subsequently filed applications. The court finds and concludes that in the subsequently filed applications, the UNITED STATES OF AMERICA is entitled to notice as to specific objections.

3. That Case 79CW176 does contemplate and provide for submission of a compilation of various water rights to be asserted by a series of amendments to be made subsequent to the date of filing of Case 79CW176; and, further, that subsequent filings in the multiplicity of cases now on file with the court specifically request that those subsequent filings be considered as partial amendments of the application filed by the UNITED STATES OF AMERICA in Case 79CW176.

* * *

25. The court then entered an order concerning the applicability of statements of opposition to Case No. 79CW176 to all other applications filed as amendments to Case No. 79CW176.

26. On October 13, 1981, the court entered an Order regarding the partial amendment of the Application filed by the United States in Case No. 79CW176. In that order, the court ruled, *inter alia*, that the applications filed subsequent to Case No. 79CW176 are merely amendments to Case No. 79CW176 and, for that reason, the court has authority to allow amendments which relate back to Case No. 79CW176. The court also found that, because of its

findings in the Order of September 16, 1981, it had "the inherent power to adjust procedures to fit this unique case and its amendments." The court ordered a cutoff date of March 31, 1982, for applications for water rights as amendments to Case No. 79CW176. Order of October 13, 1981, *nunc pro tunc* October 5, 1981, Case No. 79CW176.

27. The BLM office responsible for administration of the public land and preparation of the claims of the United States in Water Division No. 2 was, at the same time, responsible for preparation of the claims of the United States for all of the public land in Water Division No. 3. Several field seasons were required to accomplish this task. (Affidavit of John R. Hill, Jr., Exhibit I to Applicant's Memorandum of Points and Authorities in Opposition to Park Center's Motion in Limine).

28. On November 20, 1981, the United States filed an application for reserved rights in the Park Center Well which was assigned case number 81CW192. In that application, the United States claimed 2.67 cfs with a priority of May 29, 1936, for domestic, municipal and irrigation. The well is alleged to be in the watershed of Fourmile Creek at a depth of 3,216 feet. The number of acres irrigated is claimed to be 800 acres.

29. On December 7, 1981, the United States filed another amended application, with leave of court, to include a statement that the application was a partial amendment to Case No. 79CW176.

30. The November 1981 resume contained a notice of the application in Case 81CW192 and the December 1981

resume contained a notice of the same application as amended.

31. According to the records of this court, Mr. William V. Crossman, obtained a copy of the application on January 11, 1982.

32. The State of Colorado, Twin Lakes Reservoir and Canal Company, and CF&I Steel Corporation filed timely Statements of Opposition. Mr. William V. Crossman filed a Statement of Opposition on behalf of Park Center Water District to Case No. 81CW192 on March 15, 1982. On November 19, 1985, CF&I Steel Corporation was allowed to withdraw as an Objector. The State of Colorado and Park Center filed timely Supplemental Statements of Opposition pursuant to the special procedures adopted by this court for the claims of the United States in the Order of September 16, 1981, *nunc pro tunc* September 8, 1981. All other Statements of Opposition were dismissed by the pretrial order entered April 21, 1987. Thus, only Park Center and the State of Colorado remain as Objectors.

Present Posture of the Case

33. In the Pre-Trial Order entered April 21, 1987, the court ordered that the following *in limine* issues be briefed:

- a. What is the primary purpose of the federal reservation that provides the basis for the federal government's claim to the water from Park Center Well?
- b. Is the federal government entitled to antedation in this case?

c. Is Park Center Water District barred or estopped from opposing the claims of the United States to a reserved right in the Park Center Well?

34. Park Center, in its Motion *in limine* filed on 11 May, 1987, requested the court to rule on the following issues:

a. That the measure of the federal government's implied-reservation-of water right in the Park Center Well is the minimal amount of water necessary to prevent monopolization of water from that well; and

b. That the federal government is not entitled to a priority for its implied-reservation-of-water right in the Park Center Well that antedates priorities awarded to water right applications filed before January 1, 1981.

35. The United States, in its Memorandum of Points and Authorities on the Issue of Collateral Estoppel, filed pursuant to the Pre-Trial Order, on May 11, 1987, requested the court to hold Park Center estopped to challenge the claims of the United States to a reserved right on the Park Center Well.

36. On September 29, 1987, the court heard oral argument on the *in limine* issues. The court heard argument on the estoppel issues first and ruled that Park Center is collaterally estopped and estopped by contract to oppose the reserved rights claims of the United States. As an accommodation to the parties, and in the interest of judicial economy, the court heard argument on the remaining *in limine* issues and ruled that the United States reserved 2.67 cfs in the Park Center Well.

37. The United States also filed a motion to strike the statement of opposition of Park Center on the ground it

was not timely filed. Park Center opposed the motion on the basis that the motion to strike itself was not timely filed. The United States, at oral argument, stated that the motion should have been denominated a motion to dismiss for lack of subject matter jurisdiction, pursuant to Rule 12(h) (3), C.R.C.P., which can be raised at any time. The court denied the motion to strike because it was not timely filed and declined to rule on the motion to dismiss because Park Center had no notice thereof.

38. The United States, on March 23, 1988, moved for summary judgment on its claim to Park Center Well on the grounds that the court has already ruled in its favor on the issues of law and that there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

39. The court concludes that entry of final judgment is appropriate.

40. All notices required by law for filing and publication of the application in the Resume of Water Division Number 2 have been fulfilled and the court has jurisdiction over the subject matter and all parties whether or not they appeared.

Collateral Estoppel

41. The doctrine of collateral estoppel holds that the final decision of a court on an issue actually litigated and determined is conclusive of that issue in any subsequent suit. *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396, 399 (1974); *Salida School District R-32-J v. Morrison*, 732 P.2d

1160, 1163 (Colo. 1987). There are four prerequisites of collateral estoppel in Colorado: 1) identity of issues; 2) a final judgment on the merits; 3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and 4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior adjudication. *Id.* It is obvious that Park Center was a party to the appeal to the IBLA. The court, therefore, limits its discussion here to the three remaining prerequisites for collateral estoppel.

42. In the IBLA, Park Center asserted, as an alternative basis for its appeal, that it had the rights to the water from the Park Center Well as evidenced by a decree of this court in Case W-1499. *Park Center, supra*, 84 I.D. at 89. Specifically, Park Center asserted in its Statement of Reasons for Appeal filed in IBLA that its decree in W-1499 entitled Park Center to the continued use of the water and that the BLM was barred by law from raising the rates. (Exhibit A to Park Center Water District's Answer Brief on the Issue of Collateral Estoppel). The IBLA responded that "it is clear that the right to the use of the water is and always has been in the United States", 84 I.D. at 89 and "[the Park Center] well *and its water* are withdrawn from any other disposition, including the attempted disposition under state law", *Id.* at 91 (emphasis added). Therefore, it is clear that Park Center is attempting to relitigate the same issues in this court that the IBLA decided adversely to Park Center.

43. The decision of the IBLA was a final decision on the merits. Decisions of the IBLA are final agency actions for purposes of judicial review. *Winkler v. Andrus*, 494 F.Supp.

946, 947 (D. Wyo. 1980); *Shell Oil Co. v. Kleppe*, 426 F.Supp. 894, 897 (D. Colo. 1977). Park Center could have sought judicial review of the IBLA decision in federal district court. 5 U.S.C. 704; *Winkler v. Andrus*, *supra*. The IBLA decision was made on February 3, 1977, more than ten years ago. Park Center, *supra*, 84 I.D. at 87. Park Center has not sought judicial review of the decision. The statute of limitations for bringing an action against the United States is six years. 28 U.S.C. §2401(a). See, *Roberts v. Clark*, 615 F.Supp. 1554, 1556 (D. Colo. 1985) (complaint against Secretary of the Interior arising from administrative decision time-barred where not filed within six years).

44. The federal courts have held collateral estoppel applicable to administrative decisions and barred relitigation where no appeal was taken. *United States v. Karlen*, 645 F.2d 635, 638 (8th Cir. 1981); *Sierra Club v. Block*, 576 F.Supp. 959, 964 (D. Ore. 1983) (doctrine of collateral estoppel applicable to Forest Service administrative decision where party failed to seek judicial review); *Ness Investment Corp. v. United States*, 595 F.2d 585, 588 (Ct. Cls. 1979) (decision of Board of Forest Appeals *res judicata* where no judicial review sought). Collateral estoppel applies to decisions of administrative bodies under Colorado law as well. *Salida School Dist.*, *supra*; see, *Yellow Cab Inc. v. Malibu Motor Hotel, Inc.*, 172 Colo. 349, 473 P.2d 710, 711 (1970) (party who litigated issue before Public Utilities Commission and who failed to appeal collaterally estopped to relitigate issue in district court).

45. Park Center now asserts that it did not have a full and fair opportunity to litigate the issue of the reserved right of the United States in the Park Center Well because it had no incentive or opportunity to do so because the

IBLA and the federal court were not the proper forum. Park Center relies upon *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (*Akin*), to support its arguments. *Akin* involved an attempt by the United States to adjudicate its own water rights in those waters of Colorado comprising Water Division No. 7 in the United States District Court. *Id.* at 806. Thereafter, one of the defendants in the federal suit had the United States joined as a party in Water Division No. 7. The Supreme Court, after noting that the United States District Court had jurisdiction under 28 U.S.C. §1345 (United States as plaintiff), *Id.* at 808-809, held that the United States District Court should abstain in favor of the water court because of policy considerations in the McCarran Amendment, *Id.* at 820.

46. Nothing in *Akin* supports Park Center's assertions here that the United States District Court was an improper forum in which to seek judicial review of the IBLA's determination the United States has reserved the Park Center Well and its water. There was no state proceeding to abstain from. Nothing in *Akin* affects judicial review of final agency action under the Administrative Procedure Act, 5 U.S.C. §701, *et seq.*

47. Furthermore, the IBLA did not adjudicate the rights of the United States in Park Center Well; it simply held in response to Park Center's assertion that Park Center held the rights to the well, that the United States reserved the water of the well with an April 17, 1926, priority.

48. If Park Center believed the IBLA was wrong or lacked jurisdiction, it could have sought judicial review in the federal courts. Park Center, thus, had a full and fair

opportunity to litigate in the IBLA and to seek judicial review in the federal courts, the same issues it seeks to litigate again in this court. Not having done so, Park Center is now estopped to now assert that the IBLA was wrong and is without standing to oppose the claim of the United States.

Estoppel by Contract

49. Every lease, including the lease which became effective on July 1, 1971, for a term of 20 years, contained a provision that the furnishing of water under the lease "shall under no circumstances become the basis of a permanent water right." The IBLA noted this fact and held in Park Center that:

Appellants acted in total disregard of the terms of their lease in seeking a permanent water right. Having nevertheless obtained a decree in their favor, a decree invalid for numerous other reasons, appellants are estopped from asserting it as a basis for relief. (Citations omitted.)

84 I.D. at 91.

50. The precise issue the United States raises here, estoppel by contract or lease, was litigated and decided against Park Center in the IBLA. All of the foregoing discussion with respect to collateral estoppel clearly applies to this issue as well.

51. Therefore, Park Center is estopped by its lease with the United States to assert its water right as a basis for relief against the United States.

52. Park Center asserts that the IBLA erred in applying the doctrine of estoppel by contract. Even if the IBLA was

wrong, Park Center is still bound by the decision and is collaterally estopped to now assert that it is not bound by the lease from asserting its decree in W-1499 against the United States. The court which considers a plea of collateral estoppel should not review the reasoning of the court which made the prior adjudication. *University of Illinois Foundation v. Blonder-Tongue Laboratories*, 465 F.2d 380, 381 (7th Cir. 1972); *cert denied* 409 U.S. 1061 (1972). See, *Federated Department Stores v. Moitie*, 452 U.S. 394, 398 (1981) (res judicata consequences of unappealed final judgment not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case); *Accord Closed Basin Landowners Ass'n v. Rio Grande Water Conservancy District*, 734 P.2d 627, 636-637 (Colo. 1987) (judgment entered within jurisdiction of court, even if wrong, is not subject to collateral attack). Accordingly, it is immaterial whether or not the IBLA correctly applied the doctrine of estoppel by contract. The IBLA stated that Park Center was estopped by its lease and Park Center is estopped to assert its decree in Case W-1499 as a basis of relief in this case.

The Rights of the United States

53. The Act of June 16, 1934, 48 Stat. 977, provides that where a permittee strikes water instead of oil or gas the Secretary of the Interior

may when such water is of such quality and quantity as to be valuable and usable at reasonable cost for agricultural, domestic, or other purposes, purchase the casing. . . . Provided, that the land on which such well is situated shall be reserved as a water hole under Section 10 of the [Stock Raising Homestead Act, 39 Stat. 865].

54. Subsection (c) of the 1934 Act provides that the Secretary

may lease or operate such wells for the purpose of producing water and of using the same on the public lands or of disposing of such water for beneficial use on other lands. . . .

55. Subsection (d) of the same Act provides that the Secretary may

use the proceeds from the sale or other disposition of such water as a revolving fund for the continuation of such program. . . .

56. The primary purpose of the Act of June 16, 1934, was to make water available for use on the public lands or for disposition for beneficial use on other lands through the purchase of the casing of oil and gas wells that the Secretary determined are capable of producing water "of such quality and quantity as to be valuable and usable at reasonable cost for agricultural, domestic, or other purposes." The Secretary was to use the proceeds of the sale or other disposition of the water for the continuation of the program.

57. Relying upon the legislative history, Park Center argues that the Act of June 16, 1934, was a drought-relief measure and not a fund raising measure and that Congress did not intend the federal government to own rights to the water.

58. The court has reviewed both the legislative history and the contemporaneous regulations of the Secretary of the Interior and concludes that the Act was both a drought-relief measure and a fund raising measure. The legislative history as set out in 1934 Cong. Rec. 11,116-117

and S. Rept. No. 1378, 73d Cong., 2nd Sess. clearly demonstrates that the Secretary understood the bill as authorizing him to lease or operate the wells and use the proceeds therefrom to fund the program. The Senate Report directly contradicts Park Center's argument that Congress did not intend to maintain ownership of the water. A letter from the Secretary of the Interior, incorporated into and made a part of the report, states that water "developed in lands entered or patented with reservation of the oil and gas does not belong to the United States, . . . but where the title to the lands is in the United States, any water found can be utilized as provided by the bill." Thus, Congress and the Secretary apparently believed at the time that water from oil and gas wells on unpatented public land was owned by the United States. It is not necessary to decide whether the United States owns the water because the United States has not claimed ownership of the corpus of the water. However, the fact that Congress and the Secretary thought that the United States had sufficient interest in the water to dispose of the water as Congress saw fit and collect revenue therefrom contradicts Park Center's arguments that Congress did not intend to reserve to the United States whatever rights in the water were necessary to lease it or make it available to the public and collect revenues therefrom.

59. The contemporaneous regulations promulgated by the Secretary also support the conclusion that the Secretary was to either lease the well and the water or operate the well for the benefit of the public as he saw fit. Those regulations provide:

When a well found subject to the Act has been duly conditioned for use under the direction of

the oil and gas supervisor, when title to the necessary casing has been duly vested in the United States, and when decision to lease rather than to operate has been reached, the register will be directed to receive applications for lease of the requisite premises and water involved.

30 C.F.R. 241.6 (1939).

60. It is also significant that the Secretary's regulations implementing Public Water Reserve No. 107, in effect when the oil and gas conversion regulations were promulgated, provide that where water is to be transported off public land, the user is to provide evidence of application to the appropriate state official for permission to appropriate the water to the use contemplated. 43 C.F.R. 292.13 (1939). There is no comparable provision in the regulations implementing the Act of June 16, 1934, 30 C.F.R. 241 *et seq.* (1939). This also contradicts Park Center's assertion that Congress did not intend to retain ownership of the water rights to the well.

61. Clearly, the Secretary interpreted subsection (c) of the Act as allowing him to either operate the well for public use, *e.g.*, for stockwater, or to dispose of the water by leasing it. Contemporaneous construction of a statute by those charged with its implementation is entitled to great respect by the courts. *Mountain States Tel & Tel Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985); *E.I. Du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977). *See, In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 648 (1978) (presumptively correct).

62. The United States argued that the Act of June 16, 1934, was an express reservation of water. It is, however, not necessary to decide whether the Act was an express

or implied reservation. It is clear that water is necessary to fulfill the purpose of the Act and water was, therefore, reserved. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The reservation of the surrounding land is "meaningful only if the water remains." *Id.* at 140.

63. In addition to the legislative history and the contemporaneous regulations, the court is also persuaded by the manner in which the parties have operated and conducted themselves with regard to the well for more than fifty years. The parties' conduct leads to the conclusion that there was, indeed, a reservation of water in the amount produced by the well, 2.67 cfs.

64. Relying upon the proviso in the Act that the land upon which the well is situated shall be reserved as a water hole under section 10 of the Stock Raising Homestead Act, Park Center maintains that the Stock Raising Homestead Act of 1916 and the Supreme Court's discussion of public water holes and springs in *United States v. Denver*, 656 P.2d 1, 31-33 (Colo. 1982), controls the amount and scope of the reserved right. Specifically, Park Center argues that the United States is entitled to only that minimum amount of water required to prevent monopolization.

65. According to the Master-Referee's Report in *United States v. Denver*, the United States claimed both public water holes and springs reserved pursuant to 43 U.S.C. 141 and 43 U.S.C. 300 and public water holes reserved pursuant to 30 U.S.C. 229a and 43 U.S.C. 300. The Master-Referee treated these reservations separately and concluded that the converted oil and gas wells were reserved

for broader purposes. *Partial Master-Referee Report Covering All of the Claims of the United States of America* at 315, 321. No appeal was taken with respect to converted oil and gas wells, and there is no mention in *United States v. Denver* of 30 U.S.C. 229a (the Act of June 16, 1934) or of the Master-Referee's rulings with respect to the converted oil and gas wells. It is clear from the context that the Colorado Supreme Court's discussion was directed entirely to the issue of the purposes and amounts reserved from the springs as opposed to wells.

66. The most logical reason for the proviso in subsection (a) of the Act of June 16, 1934, requiring that the land upon which the well is situated to be reserved as a water hole is that it must have been intended to facilitate the making of the water produced by the well available to the public. If the land upon which the well was situated were not withdrawn from entry, the government risked the loss of the valuable resource the Act contemplated making available to the public as well as the government's investment in purchasing the casing and conditioning the well. As the Supreme Court stated in *Cappaert*, "the protection contemplated [by reserving the 40-acre tract] is meaningful only if the water remains." 426 U.S. at 140.

67. The regulations promulgated by the Secretary on October 23, 1934, implementing the Act of June 16, 1934, and codified and published at 30 C.F.R. 241 (1939), also support the conclusion that the reservation of the land as a water hole was to prevent filing or entry on the land subdivision. See, 30 C.F.R. 241.6 (register of district office of General Land Office to prevent filing or entry on land subdivision involved).

68. Park Center's interpretation would use the proviso to limit the United States' entitlement to a relatively small amount to "prevent monopolization." This interpretation would have the court ignore the provisions of the 1934 Act relating to its very purpose – making valuable and usable quantities of water available at reasonable cost for "agricultural, domestic or other purposes" – and using the proceeds from the sale or other disposition of the water for the continuation of the conversion program. In interpreting the 1934 Act, the court "must not be guided by a single sentence . . . but look to the provisions of the whole law, and to its object and policy." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). Therefore, the court rejects Park Center's interpretation of the Act of June 16, 1934, and concludes that the amount reserved is not the minimal amount required to prevent monopolization.

69. The Act of June 16, 1934, specifies the uses of water for which a water-producing oil or gas well may be purchased and reserved as "agricultural, domestic or other." The United States has claimed "domestic, municipal, and irrigation" as the uses of water. These uses are clearly within the purposes contemplated by the 1934 Act. "Agriculture" obviously includes "irrigation", and "domestic" and "municipal" are closely related and certainly included within "other".

70. The amount of water reserved is that amount "necessary to fulfill the purpose of the reservation, no more." *Cappaert, supra*, 426 U.S. at 141. When the determination to purchase the casing and condition the well was made, the flow of the well was 2.67 cfs. This was the quantity determined by the Secretary to be "valuable and usable at reasonable cost." Furthermore, the original Offer to

Lease, after stating that the artesian flow of water from the well was measured at 2.67 cfs, invited quotation of prices from prospective lessees for daily water charges based on the "... natural flowing capacity of the well ..." from "more than 2.5 cubic feet per second" to "... [n]ot more than 0.5 cubic feet per second ..." in increments of 0.5 cfs. (Exhibit B to Applicants Memorandum of Points and Authorities in Opposition to Park Center's Motion In Limine at p. 3). The Offer to Lease Water included the form for the lease to be awarded which contained the same schedule for charges. (Exhibit C to Applicants Memorandum of Points and Authorities in Opposition to Park Center's Motion In Limine at p. 2). In addition, the proposed form of the lease granted "... to the lessee the exclusive right and privilege to take and use or dispose of all water from a well situated in the [legal description of Park Center Well], which tract is included in Public Water Reserve No. 107. ..." (emphasis added) *Id.* Clearly, it was the intent of the United States to lease the entire flow of the well and to be paid according to the flow of the well. That flow was measured at 2.67 cfs at the time of the Offer to Lease and 2.67 cfs is no more than the amount required to fulfill the purpose of the reservation.

71. The priority date of a reserved right is the date of the reservation. *Cappaert, supra*, 426 U.S. at 138. The land surrounding the well was withdrawn on September 27, 1934, and this date would be the priority date but for the fact that the United States claimed May 29, 1936, in its application. The United States has advised the court that it will accept May 29, 1936, as the priority date to avoid

the necessity of republication. Accordingly, May 29, 1936, is the priority date for Park Center Well.

Antedation

72. Relying upon *United States v. Bell*, 724 P.2d 631 (Colo. 1986), Park Center argues that, because the application in Case 79CW176 did not include all of the elements of an application required by § 37-92-302, it did not provide notice of the claim to Park Center Well. Park Center argues that this is the equivalent of a missing a filing deadline. Therefore, according to Park Center, the United States may not be awarded a priority antedating those rights decreed as a result of applications filed prior to January 1, 1981.

73. Reliance upon *Bell* does not avail Park Center. Its lease with the United States specifically precludes Park Center from obtaining a permanent water right. The court finds *Perdue v. Fort Lyon Canal Company*, 519 P.2d 954 (Colo. 1974) applicable to this case. Accordingly, the right of the United States is senior to any right which may be claimed by Park Center Water District regardless of when the right of the United States is claimed.

74. Park Center includes an affidavit (Exhibit C to its Answer Brief) alleging that Mr. Hook advised unnamed officials at the local BLM office that Park Center intended to file a water right claim. Park Center's assertion that the federal government knew of Park Center's intent to file a water right claim also does not avail Park Center.

75. Even if the BLM local officials told Park Center that it was free to claim a water right, the government would

not be bound by such statements. As a general rule, persons dealing with the government assume the risk that employees purporting to act for the government are acting within the bounds of their authority. *Heckler v. Community Health Services*, 467 U.S. 51, 63-65 (1984). This rule is especially applicable to oral communications with government employees. *Id.* Furthermore, of even more significance in the context of this case involving water rights (property) of the United States is the rule that government employees or agencies do not by their conduct cause the government to lose its property rights. *United States v. California*, 332 U.S. 19, 39-40 (1947). See *United States v. Utah Power and Light Co.*, 243 U.S. 389, 409 (1917) (implied acquiescence by Forest Service Officials in construction of diversion works on national forest did not estop the United States).

76. Because the application of *Perdue* subordinates Park Center's decree in W-1499 to the right of the United States, it is not necessary to decide the antedation issues Park Center seeks to raise. It is, however, necessary to decide the claim of the United States to antedation in order to enter a final decree in this case.

77. When the United States is properly joined in an adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666, and provided the opportunity to adjudicate its claims, the United States may be decreed reserved rights with priorities antedating other adjudicated water rights. *United States v. Bell*, 724 P.2d 631, 642 (Colo. 1986).

78. This court has recognized that the United States was faced with a complicated case involving numerous claims, all of which could not have reasonably been filed

in 1979. Because of the complexity of the task, this court has permitted the United States to file separate, specific applications supplementing the general application for water rights in Case No. 79CW176 and also ordered that each such amendment or supplemental application would relate back to Case No. 79CW176. The court allowed the United States until March 31, 1982, in which to file amendments relating back to 79CW176. Orders of September 16, 1981, *nunc pro tunc* September 8, 1981 and October 13, 1981, *nunc pro tunc* October 5, 1981. See, *United States v. Jesse*, 744 P.2d 491, 497 (Colo. 1987) (noting the procedures used in this water division for the claims of the United States).

79. Each of the separate applications has been published in the resume, and objectors to either case 79CW176 or the specific supplemental or amended application have been afforded the opportunity to challenge the specific claims of the United States.

80. It is, of course, true that the United States did not file a specific application for the Park Center Well in 1979. This court has determined that, as a matter of fact, because of the complexity of the task, the United States could not do so.

81. *United States v. Bell* involved an entirely different situation than that of the United States in this case. In *Bell*, the United States sought to amend its original application, 11 years after it was filed, to include what the Colorado Supreme Court regarded as a new claim. *Id.* at 645. It was the limited nature of the original application

in *Bell* that caused the Court to conclude that the proposed amendment was a new claim. See *Id.* at 639 (unambiguous claim to water located *on* reserved land was not notice of a claim to the Colorado mainstem where the latter did not touch the reservation). Here, the original resume notice was not limited – it included any converted oil and gas well in the Arkansas River drainage. Also, the United States stated that it would amend the applications and this court allowed those amendments.

82. Furthermore, the Colorado Supreme Court recognized the distinction between amendments like the one in *Bell* which the court characterized as a new claim not qualifying for antedation and amendments which merely clarify the original claim which may qualify for antedation. *Id.* at 631. The application in Case No. 81CW192 is merely a clarification of the broad claim in the original application to all converted oil and gas wells in the Arkansas River Drainage.

83. The Colorado Supreme Court's concern in *Bell* was with frustration of the McCarran Amendment's purposes, *Id.* at 642, and the incentive in the postponement doctrine in § 37-92-306 to file all claims at one time. *Id.* at 645. There is no frustration of the McCarran Amendment or the postponement doctrine in this case. The United States recognized its obligations under both and obtained this court's approval of an orderly process to submit all of its claims within a reasonable time in light of the complexity of this case. Nothing in the McCarran Amendment or *Bell* suggests that the United States could be deprived of its right to antedate its reserved rights priorities for failure to file all of its claims in 1979, where, as a matter of fact, it was not possible to do so.

Administration

84. The reserved rights of the United States are subject to state administration as is any other decree with the same priority. 43 U.S.C. § 666; *United States v. Denver*, *supra*, 656 P.2d at 35.

85. The Act of June 16, 1934, contemplated that the Secretary of the Interior may operate the well for use on the public land or dispose of the water it produces by lease for use for "agricultural, domestic or other purposes" on other lands. In the event the Secretary wishes to lease the entire 2.67 cfs for irrigation rather than for the present uses of domestic, municipal and irrigation, the United States will have to obtain a decree from this court for a change of water right. *Id.* However, this reserved right cannot be lost or diminished through failure to use it to its full potential and it exists for future needs of the reservation. *Arizona v. California*, 373 U.S. 564, 600 (1963). See *United States v. Jesse*, *supra*, 744 P.2d at 494 (reserved rights not lost by nonuse). Therefore, it is appropriate to quantify the right to permit it to be used up to its full potential for irrigation. In other words, while the amount of the right is fixed at 2.67 cfs, the ability to change the right to accomplish the purpose of making that amount available for use should not be limited by the historic consumptive use, or lack thereof, associated with Park Center's use of the well. Rather, the right should be limited by the duty of 2.67 cfs for irrigation.

86. Therefore, in the event the Secretary decides to dispose of the water produced by the Park Center Well in some fashion other than the present arrangement with

Park Center, the United States is entitled to do so provided it applies to this court for a change of water right. In that event, the United States shall be entitled to change the historic consumptive use associated with the use of 2.67 cfs of water to irrigate 66.75 acres.

Status of W-1499

87. In its Memorandum of Points and Authorities in Opposition to Park Center's Motion in Limine, the United States argued that Park Center had no right in the Park Center Well because it has not appropriated any water. In the Order entered September 29, 1987, this court declined to rule on this issue and stated:

With regard to the issue of the status of the water right that was adjudicated in Case No. W-1499, by this ruling the Court is not canceling, vacating or voiding said Decree; however, for purposes of this case, Park Center Water District cannot rely on that decree to give it standing between the United States and Park Center Water District to oppose the claim in this case.

88. Park Center's decree in W-1499 is, also, without force or effect as against the United States. In addition, the court finds that, because the United States reserved the entire production of Park Center Well as of May 29, 1936, all of the water furnished under the lease from the United States to Park Center has been under the reserved right decreed herein.

89. The United States has demonstrated its entitlement to this decree as a matter of law.

DECREE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED the United States has a reserved right to 2.67 cfs out of the Park Center Well located in the SW¹/₄ of the SW¹/₄ of Section 34, T. 17 S., R. 70 W., 6th P.M. in Fremont County, Colorado, with antedated priority of May 29, 1936, for domestic, municipal and irrigation purposes.

1. That the source of the water is groundwater tributary to the Arkansas River within the watershed of Fourmile Creek.
2. The depth of the well is 3,216 feet.
3. The maximum amount of acreage that may be irrigated in the future is 66.75 acres.
4. The reserved right decreed herein is subject to administration by the State Engineer as is any other decree for the purposes decreed herein with a priority of May 29, 1936, in accordance with such rules, regulations or procedures currently in force or which the State Engineer may, from time to time, prescribe, and in accordance with such informal procedures as the State Engineer may choose to follow pursuant to law.
5. The Applicant shall install and maintain such water measurement devices, recording devices, content gauges and inlet and outlet measurement and recording devices, as the case may be, as are deemed essential by the Office of the State Engineer, and the same shall be installed and operated in accordance with instructions from said Office.

6. The water clerk shall serve a copy of this Decree upon the parties, the Division Engineer, Water Division No. 2 and the State Engineer.

DONE and dated this 7th day of May, 1988.

BY THE COURT:

/s/ John R. Tracey
JOHN R. TRACEY, Water Judge
Water Division No. 2

Filed in the office of the
Clerk, District Court Water
Division No. 2, State of
Colorado

MAY 7 1988
Priscille S. Lucero
Clerk

APPENDIX C

Oil and Gas Conversion Act of June 16, 1934

AN ACT

To amend the Mineral Lands Leasing Act of 1920 with reference to oil- or gas- prospecting permits and leases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain", approved February 25, 1920, as amended, is amended by adding the following new section:

"SEC. 40. (a) All prospecting permits and leases for oil or gas made or issued under the provisions of this Act shall be subject to the condition that in case the permittee or lessee strikes water while drilling instead of oil or gas, the Secretary of the Interior may, when such water is of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, purchase the casing in the well at the reasonable value thereof to be fixed under rules and regulations to be prescribed by the Secretary: *Provided*, That the land on which such well is situated shall be reserved as a water hole under section 10 of the Act of December 29, 1916.

"(b) In cases where water wells producing such water have heretofore been or may hereafter be drilled upon lands embraced in any prospecting permit or lease heretofore issued under the Act of February 25, 1920, as amended, the Secretary may in like manner purchase the casing in such wells.

"(c) The Secretary may make such purchase and may lease or operate such wells for the purpose of producing water and of using the same on the public lands or of disposing of such water for beneficial use on other lands, and where such wells have heretofore been plugged or abandoned or where such wells have been drilled prior to the issuance of any permit or lease by persons not in privity with the permittee or lessee, the Secretary may develop the same for the purposes of this section: *Provided*, That owners or occupants of lands adjacent to those upon which such water wells may be developed shall have a preference right to make beneficial use of such water.

"(d) The Secretary may use so much of any funds available for the plugging of wells, as he may find necessary to start the program provided for by this section, and thereafter he may use the proceeds from the sale or other disposition of such water as a revolving fund for the continuation of such program, and such proceeds are hereby appropriated for such purpose.

"(e) Nothing in this section shall be construed to restrict operations under any oil or gas lease or permit under any other provision of this Act."

Approved, June 16, 1934.

APPENDIX D

Park Center Decree, Case No. W-1499
April 24, 1973

IN THE DISTRICT COURT IN AND FOR
WATER DIVISION NO. 2
STATE OF COLORADO

CASE NO. W-1499

IN THE MATTER OF THE)	J U D G M E N T
APPLICATION)	AND
FOR WATER RIGHTS OF)	DECREE
PARK CENTER WATER DISTRICT)	
CANON HEIGHTS IRRIGATION)	
AND RESERVOIR COMPANY)	
IN FREMONT COUNTY)	
)	

THE COURT FINDS That no protest has been filed to the Ruling of the Water Referee in the above case within the time provided by law, and that the said Ruling should be confirmed, approved and adopted,

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED That the Ruling of the Water Referee entered on March 20, 1973, be and the same is incorporated herein by reference and is hereby confirmed, approved and adopted as the judgment of this Court.

Done this 24th day of April, A. D. 1973.

BY THE COURT:

/s/ William L. Gobin
WATER JUDGE

cc: Park Center Water District
Canon Heights Irrigation
and Reservoir Company
P. O. Box 860
Canon City, Colorado 81212

Division Engineer

State Engineer

IN THE DISTRICT COURT IN AND FOR
WATER DIVISION NO. 2
STATE OF COLORADO

CASE NO. W-1499

IN THE MATTER OF THE)	RULING OF
APPLICATION)	REFEREE
FOR WATER RIGHTS OF)	
PARK CENTER WATER DISTRICT)	
CANON HEIGHTS IRRIGATION)	
AND RESERVOIR COMPANY)	
IN FREMONT COUNTY)	

Pursuant to Order of Referral filed and entered in the above case on June 14, 1972, the undersigned Water Referee, having investigated the matter of the application on file herein, hereby makes the following findings and ruling thereon:

FINDINGS OF FACT

1. That the said application was filed on June 14, 1972.
2. That the Water Clerk caused publication of such filing as provided by statute; that the time for filing Statements of Opposition expired on the last day of: August 1972 and that none has been filed.

3. That the said application covers a well which is used for domestic (municipal) and irrigation use and which has not been registered with the State Engineer.

IT IS, THEREFORE, ORDERED AS FOLLOWS: That applicant(s) be, and (are) hereby, awarded a water right which is described as follows to-wit:

NAME AND

ADDRESS: Park Center Water District
Canon Heights Irrigation
and Reservoir Company
P.O. Box 860
Canon City, Colorado 81212

UNDERGROUND WATER RIGHT

NAME OF WELL: Canon Heights - Park Center Well.

LOCATION OF WELL: In the SW 1/4 of the SW 1/4 of Sec. 34, T. 17S., R. 70W. of the 6th P.M.

DEPTH: 3,000 feet.

PRIORITY DATE: January 8, 1938.

AMOUNT OF WATER: 708 g.p.m.

USE OF WATER: Domestic and irrigation

STATE ENGINEER'S WELL NUMBER: None.

MEANS OF DIVERSION: By appropriate pump and pipeline.

IT IS FURTHER ORDERED That applicant(s) shall install and maintain such water measurement devices,

recording devices, content gauges and inlet and outlet measurement and recording devices, as the case may be, as are deemed essential by the Office of the State Engineer, and the same shall be installed and operated in accordance with instructions from said office.

IT IS FURTHER ORDERED That copies of this ruling shall be mailed as provided by statute.

Dated and filed with the Water Clerk this 20th day of March, A. D. 1973.

BY THE REFEREE:

/s/ Robert F. Harrison
Water Referee, Water
Division No. 2
State of Colorado

APPENDIX E

Subsection (c) of the Conversion Act
(Act of June 16, 1934)

Note: The language stricken was deleted in Committee and the capitalized language was inserted. Thus, the Conversion Act as first proposed contained the stricken language and excluded the capitalized language; the Act as adopted omitted the stricken language and included the capitalized language.

- (c) The Secretary may make such purchase and may lease or operate such wells for the purpose of producing water and of using the same on the public lands or of ~~selling or otherwise~~ disposing of such water FOR BENEFICIAL USE ON OTHER LANDS, and where such wells have heretofore been plugged or abandoned or where such wells have been drilled prior to the issuance of any permit or lease by persons not in privity with the permittee or lessee, the Secretary may develop the same for the purposes of this section: *Provided*, That owners or occupants of lands adjacent to those upon which such water wells may be developed shall have a preference right to ~~purchase or lease~~ MAKE BENEFICIAL USE OF such water.
-

APPENDIX F

Solicitor's Opinion No. 28853

July 20, 1937

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington

M. 28853.

July 20, 1937.

The Honorable

The Secretary of the Interior.

My dear Mr. Secretary:

The following questions contained in proposed instructions for oil and gas Supervisors of the Geological Survey, relating to water wells on public lands which have been conditioned as a source of water under the act of June 16, 1934 (48 Stat. 977), have been submitted for my opinion:

1. Is it necessary or proper for the Federal Government to obtain a right pursuant to State law to use the water of a well belonging to the United States situated on land included in a public water reserve?
2. Does the establishment of a public water reserve constitute a reservation to the United States for the purpose of the reserve of the water of a well belonging to the United States within the boundaries of the reserve?
3. Can a valid right to the use of a well belonging to the United States within the boundaries of a public water reserve be granted by a State official pursuant to State law?

In two opinions under date of October 22, 1935 (55 I. D. 371, 378), the Solicitor considered several phases of the general subject of water rights, and especially as related to the States of California and Utah. It was noted that California recognizes the common law doctrine of riparian rights in waters, as modified in certain respects, while the State of Utah, on the contrary, provides that the right to the use of waters can be acquired only by appropriation in accordance with State laws. Reference was made to certain legislation whereby Congress surrendered to the States the right to control the appropriation and use of nonnavigable streams on the public lands, but it was held that such grant of authority does not extend to reserved public lands unless the water can be diverted at a point not affected by the reservation, unless a right of way has been obtained in accordance with Federal laws providing for rights of way over certain classes of reservations and under prescribed conditions, there being a clear distinction between water rights and rights of way over land for the use of such waters. It was observed also that each State had the right to determine for itself to what extent the rule of appropriation or the common law rule in respect to riparian rights should obtain; that the Federal grants of authority referred to therein simply recognized and give sanction to State laws with respect to the use and appropriation of waters, and remove what otherwise might be an impediment to the full and successful operation thereof. It was accordingly held with respect to lands in California that the Government, as riparian owner, is entitled to such water as needed for the beneficial use of the riparian lands without formal appropriation thereof under the alternative procedure provided

by State law. But with respect to lands in Utah it was held that no authority appeared for the acquisition by the Federal Government of a dependable water right in underground waters in connection with wells on public lands of the United States, except upon compliance with the water-right laws of the State. It was pointed out that while the Government could protect the use of wells on a particular tract by reserving the same and refusing to grant a right of way thereover to private parties, yet if the waters are in flux, either on the surface or underground, they are subject to claim by the first appropriator thereof, under the laws of Utah, for use on private lands or on any public lands properly subject to such use.

This summary of the said former rulings appears applicable to the questions presented, and further extended discussion of basic principles seems unnecessary except as may be required in consideration of the viewpoint expressed in the proposed instructions above mentioned, from which the following is quoted:

"The act of August 21, 1916 (39 Stat. 518, U.S.C. Title 43, sections 361 and 363) authorizes the Secretary of the Interior to discover, develop, protect and render more accessible for the benefit of the general public, springs, streams and waterholes on arid public lands of the United States. He is also authorized to provide ready means, apparatus and appliance for bringing water to the earth's surface at such waterholes. The act prescribes a severe penalty for any person who shall wilfully or maliciously fill up, render foul, or in anywise destroy or impair the utility of said streams, springs, and waterholes. The Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary

for the purposes of this law. No reference to any appropriation under State laws is made in this enactment, and apparently the Congress did not consider such an appropriation necessary.

"The act of June 28, 1934 (48 Stat. 1275, U.S.C. Title 43, Sec. 315, b and c) commonly known as the Taylor Grazing Act, provides that:

Nothing in this chapter shall be construed or administered in any way to diminish or impair to the possession and use of water * * * vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

-But also contains the further provision:

That fences, wells, reservoirs * * * may be constructed on the public lands within such grazing districts under permit issued by authority of the Secretary * * * No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements.

"A reasonable interpretation of the foregoing law would be that watering places constructed on the public domain within grazing districts are under exclusive control of the Government and that use of wells and reservoirs constructed under Federal permit shall be authorized by Federal permit, subject only to prior rights vested or accrued under law *validly affective* the public lands.

"The act of June 16, 1934 (48 Stat. 977), adding sec. 40 to the Mineral leasing Act of

February 25, 1920, authorizes the Secretary of the Interior to purchase the casing in wells drilled on public lands for oil or gas which strike water of such quantity and quality as to be valuable and usable for agricultural, domestic or other purposes provided the land on which such well is situated is reserved as a waterhole under sec. 10 of the act of December 29, 1916. The Secretary is further authorized to lease or operate such wells for the purpose of producing water, and using the same on public lands or disposing of such water for beneficial use on other lands. The act provides that the proceeds from the sale of such water shall be placed in a revolving fund for future use for the same purpose.

"There can be no question concerning the intention of Congress to provide special Federal procedures for water appropriations under the above mentioned laws without regard to State laws. Where the procedure involves a permanent dedication of the water to a specified purpose the land must be reserved. It is only reasonable to conclude that reservation of the water that is necessary to fulfill the purpose of the reservation of lands is included in the reservation of lands and that thereafter no attempted appropriation under State law in conflict therewith, can be valid.

"In view of the foregoing discussion no State water right filing by the Federal Government or its lessees is necessary to protect the public interest in lands included in a public water reserve. The creation of the reserve includes a reservation of the water needed to fulfill the purpose of the reserved lands. No state has power to grant a water right which will adversely affect any prior claim asserted by the Federal Government under its ownership of the public lands.

"In the interest of comity any Federal claim to water may be listed in the local office of record for private appropriations but such listing is not essential and if made should not be accompanied by the payment of any fees."

The purport of this reasoning is that Congress, by the acts mentioned and for the purposes thereof, has indicated a departure from the general rule and has authorized the use and disposal of the waters found in such reserves without regard to State laws; that reservation of the land carries with it an appropriation of the waters without resort to State laws, notwithstanding the prior general cession to the States of the right to control the appropriation and use of the nonnavigable waters on the public lands.

In the case of *California Oregon Power Co. v. Beaver Portland Cement Co.* (295 U. S. 142), the Supreme Court of the United States, after reviewing Federal legislation and court decisions on the subject, said, *inter alia*, that:

"If it be conceded that in the absence of Federal legislation the State would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the State, and that it has done so by the legislation to which we have referred, cannot be doubted."

At another place in the same decision, the court said:

"What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including, those since created out of the territories named, with the right in each to determine for itself to what extent the rule of

appropriation or the common-law rule in respect of riparian rights should obtain."

In a note appended to said decision, it was remarked as not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of State Law in respect of the acquisition of water for governmental purposes, citing certain instances.

In view of this general and well established policy where no reservations are concerned, I do not believe that the Department would be warranted in relying upon the view that a mere reservation of lands for the use of waters constitutes a reservation of the waters also, equivalent to a recognized water right, independently of State laws. To overthrow such a long continued policy of Congress to recognize the efficacy of State laws with respect to water rights would require very clear and specific legislation. I do not regard the acts in question sufficiently specific to warrant the conclusion that the general rule is not applicable. In reaching this conclusion, I have not overlooked certain decisions holding that State laws are not applicable for the appropriation of waters affecting reserved lands. But these are considered as inconclusive or not of general application. There is at least sufficient doubt to make it unsafe to proceed on the assumption that a dependable water right has been secured to the United States by the reservation of the lands. Whether or not, as a practical matter, it be deemed essential that the Government obtain a recognized water right, is an administrative question. It is believed that only a few States undertake to control underground waters, the State of Utah being one. The laws of the

particular State concerned should be examined when considering the question of water appropriation therein.

The above conclusions formulated into answers to the several questions are as follows:

1. In order to obtain a recognized and dependable water right in a State which undertakes to control the use of underground waters, it is necessary for the Federal Government to apply pursuant to State law for the use of the water of a well belonging to the United States situated on land included in a public water reserve.
2. The establishment of a public water reserve does not, beyond question, constitute a reservation of the water of a well belonging to the United States within the boundaries of the reserve, so as to prevent others from intercepting the flow at a point outside the reservation and appropriating the water if the State law, as in Utah, authorizes such appropriation.
3. The water of a well belonging to the United States within the boundaries of a water reserve cannot be appropriated under State law within the confines of the reserve except by the United States itself or by others through its authority.

Respectfully,

(Sgd) Frederic L. Kirgis,
Acting Solicitor.

Approved: July 20, 1937.

(Sgd) Oscar L. Chapman,
Assistant Secretary.



2
No. 89-1194

Supreme Court, U.S.

FILED

MAR 26 1990

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

PARK CENTER WATER DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Colorado Supreme Court correctly held that the United States holds a reserved water right to water from a well located on federal lands which have been withdrawn and reserved pursuant to the Oil and Gas Conversion Act of 1934, 30 U.S.C. 229a.

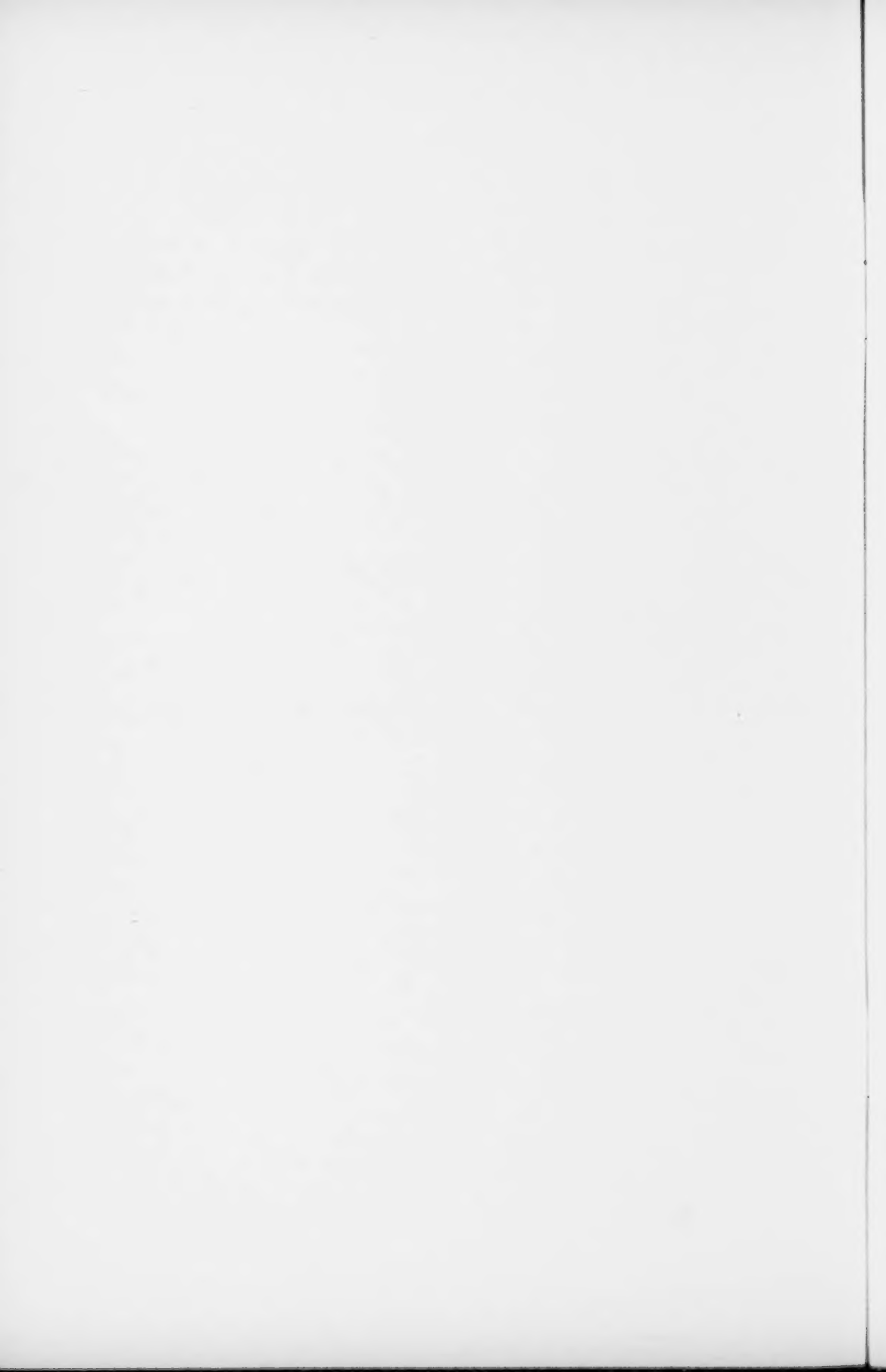


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OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App. 1-20) is reported at 781 P.2d 90. The findings of fact, conclusions of law and decree of the district court (Pet. App. 21-51) are unreported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on October 23, 1989. The petition for a writ of certiorari was filed on January 19, 1990. The jurisdiction of this Court is invoked under the Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662 (to be codified at 28 U.S.C. 1257(a)).

STATEMENT

In this action, the Colorado Supreme Court unanimously affirmed a determination and decree of the District Court, Water Division No. 2, State of Colorado (water court), which held that the United States has a reserved water right to 2.67 cubic feet per second (cfs) from a well situated on federal lands that have been withdrawn and reserved pursuant to the Act of June 16, 1934 (Oil and Gas Conversion Act of 1934), 30 U.S.C. 229a.

1. Congress enacted the Oil and Gas Conversion Act of 1934 (Conversion Act), ch. 557, 48 Stat. 977, 30 U.S.C. 229a, as an amendment to the Mineral Leasing Act, 30 U.S.C. 181 *et seq.* See Pet. App. 52-53. Subsection (a) of the Conversion Act provides, in substance, that where a federal oil and gas lessee strikes water instead of oil or gas, "the Secretary of the Interior may, when such water is of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, purchase the casing in the well." Until 1976, Subsection (a) further stated that "the land on which such well is situated shall be reserved as a water hole under section 10 of the Act of December 29, 1916."¹ Subsection (c) provides that

¹ The Act of Dec. 29, 1916, ch. 9, § 2, 39 Stat. 862, is popularly known as the Stock-Raising Homestead Act (SRHA). Section 10 of the SRHA stated that "lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved * * * and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe." Section 10 was repealed in 1976 (and

where the well casing is so purchased, the Secretary "may lease or operate such wells for the purpose of producing water and of using the same on the public lands or of disposing of such water for beneficial use on other lands." Finally, Subsection (d) states that the Secretary "may use the proceeds from the sale or other disposition of * * * water [under the Act] as a revolving fund for the continuation of such program, and such proceeds are hereby appropriated for such purpose.

2. The Park Center Well was drilled prior to the enactment of the Conversion Act on federal lands in Colorado as an exploratory well for oil and gas under the Mineral Leasing Act. The well never struck oil or gas; rather, it intercepted water under artesian pressure. After passage of the Conversion Act, the 40-acre legal subdivision containing the well was withdrawn on September 27, 1934, pursuant to Order of Interpretation No. 209 and the Executive Order of Withdrawal dated April 17, 1926, also known as Public Water Reserve No. 107. In June 1935, the artesian flow of water from the well was measured at 2.67 cubic feet per second. In 1936, the United States purchased the casing of the well under the Conversion Act. Pet. App. 2-5, 22.

Since 1937, all the water from the well has been used by petitioner or its predecessor, the Canyon Heights Irrigation and Reservoir Company (Canyon

conforming amendments were made to Section (a) of the Conversion Act) by Section 704 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792, but all withdrawals in force at that time remained in force until specifically revoked or changed in accordance with the 1976 Act. See *United States v. City and County of Denver (Denver I)*, 656 P.2d 1, 31 n.47 (Colo. 1983).

Heights), under a series of leases issued by the United States. Every lease, including the current lease, has contained the following provision:

The furnishing of water hereunder shall under no circumstances become the basis of a permanent water right.

Pet. App. 5.

In 1972, petitioner and Canyon Heights filed an application in the water court for a water right to the Park Center Well. Pet. App. 5. On April 24, 1973, the water court entered a decree awarding a water right to Park Center in the well for 708 gallons per minute (1.58 cfs) for domestic and irrigation purposes with a priority date of January 8, 1938. *Ibid.*; Pet. App. 54-57. The United States had not yet been joined in the Division No. 2 proceedings when the 1973 decree issued. Pet. App. 6.

3. Pursuant to the McCarran Amendment, 43 U.S.C. 666, the United States was joined as a party to the general adjudication of water rights in Water Division No. 2 in May 1979. In December 1979, the United States filed a general application for claims of federal reserved water rights and state appropriative rights. The application sought, among other things, confirmation of water rights to all Conversion Act wells within Water Division No. 2. Thereafter, the United States filed an amended application specifically claiming 2.67 cfs from the Park Center Well, with a priority date of May 29, 1936, for domestic, municipal and irrigation use. Petitioner and the State of Colorado filed statements of opposition.² The United

² Although the State of Colorado filed a statement of opposition, and a supplemental statement of opposition, it made no further filings in opposition to the federal government's claim. Certain private parties in addition to petitioner likewise

States subsequently moved for summary judgment on its claim. Pet. App. 7-10, 25-31.

The water court entered findings of fact, conclusions of law, and a decree (Pet. App. 21-51) granting the motion for summary judgment and decreeing to the United States a reserved water right "to 2.67 cfs out of the Park Center Well * * * with antedated priority of May 29, 1936, for domestic, municipal and irrigation purposes."³ Pet. App. 50. The water court found that petitioner was collaterally estopped from challenging the United States' claim because petitioner had asserted the same purported water right in administrative proceedings before the Department of the Interior; the issue had been resolved against petitioner; and petitioner did not seek judicial review of the determination. Pet. App. 31-35.⁴ The water

initially filed statements of opposition, but these oppositions were later withdrawn or dismissed prior to entry of the water court's decree. Pet. App. 29.

³ Although the United States normally would have been entitled to a priority date of September 27, 1934, the date on which the subdivision in which the well is located was withdrawn and reserved, the United States agreed to accept the May 29, 1936 priority date, as this was the date which had been listed in the government's application. Pet. App. 11 n.12, 43-44.

⁴ In 1976, petitioner took an administrative appeal to the Interior Board of Land Appeals (IBLA) from an order of the Bureau of Land Management (BLM) increasing the rate payable for water provided from the Park Center Well. Among other things, petitioner contended that it held a water right pursuant to Colorado law to the water from the well and, accordingly, the BLM was precluded from imposing any additional charges on the water. The IBLA rejected this contention, concluding that "the right to the use of the water is and always has been vested in the United States." *Park Center Water District and The Canon Heights Irrigation and*

court likewise found that petitioner was estopped under the terms of its lease, which denied that the arrangement could become "the basis of a permanent water right," from challenging the federal water right claim. Pet. App. 35-36. After considering the purposes of the Conversion Act, the court then ruled that the United States is entitled to a reserved right to 2.67 cfs of water from the well. Pet. App. 36-44, 50. The court also held that the claim had been timely filed under Colorado law so that it had priority over petitioner's 1973 decree. Pet. App. 44-47.

4. The Colorado Supreme Court affirmed in a unanimous opinion. Pet. App. 1-20. The court agreed with the water court "that the United States, by virtue of the Conversion Act, reserved the right to the use of water flowing from the converted wells." Pet. App. 16. It identified the purposes of the Conversion Act as first, providing water for beneficial use on both reserved and private adjacent land and, second, raising proceeds from the sale of well water to finance the program of converting more wells. As to the extent of the right, the Colorado Supreme Court followed its previous decision in *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1983) (*Denver I*), which in turn relied on this Court's decisions in *Cappaert v. United States*, 426 U.S. 128 (1976), and *United States v. New Mexico*, 438 U.S. 696 (1978). The state court therefore noted that its task was to "determine the precise quantity of water—the minimal need as set forth in *Cappaert* and *New Mexico*—required for [the purposes of the Conversion

Reservoir Co., 28 I.B.L.A. 368, 373 (1977). The IBLA also found that petitioner was estopped under the terms of its lease from claiming a permanent right to the use of water from the well. *Id.* at 376.

Act].” Pet. App. 16 (quoting *Denver I*, 656 P.2d at 20). Applying this standard, the court found that the claimed amount of 2.67 cfs, which was the entire artesian flow of the well in 1935 prior to the issuance of the initial lease, “is no more than the amount of water needed to fulfill the purpose of the reservation.” Pet. App. 17. The court also ruled that the federal government’s claim was entitled, under Colorado law, to priority over petitioner’s 1973 decree, which had issued before the United States had been joined in the litigation. Pet. App. 17-19. In view of its disposition of these matters, the court found it unnecessary to reach the estoppel issues. Pet. App. 19 n.22.

ARGUMENT

The unanimous decision of the Colorado Supreme Court is correct and does not conflict with any decision of this Court or any other court. Nor does the petition present any important, recurring issue of law warranting review by this Court.⁵

1. The Property Clause of the United States Constitution, Art. IV, § 3, empowers Congress to enact legislation affecting the use and disposition of unappropriated non-navigable waters on federal lands. See *Cappaert*, 426 U.S. at 138; *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935). The Conversion Act represents a highly unusual form of exercise of that authority. Unlike most statutes concerning the reservation of federal lands, which contain no mention of water and which, therefore, require ascertainment of implied congressional intent whenever matters concern-

⁵ As the court below noted (Pet. App. 14-15), the instant decision is apparently the first reported federal case involving the Conversion Act.

ing water rights arise, the Conversion Act expressly mentions, indeed exclusively concerns, water.

Subsection (c) of the Conversion Act provides that where the government has purchased the casings of oil and gas wells on federal lands, the Secretary "may *lease* or operate such wells for the purpose of producing water and of using the same on the public lands or of disposing of such water for beneficial use on other lands." Emphasis added. Subsection (d) provides that the Secretary "may use the proceeds from the *sale* or other disposition of such water as a revolving fund for the continuation of such program." Emphasis added. The legislative history of the Conversion Act confirms that its purposes are to authorize the Secretary to purchase the casings of oil and gas wells and "to lease or operate such wells for the production and disposal of the water where the water is valuable for agricultural or domestic use." S. Rep. No. 1378, 73d Cong., 2d Sess. 2 (1934) (quoting incorporated Letter from Secretary Harold Ickes to Senator Robert Wagner (June 9, 1934)). Because the water flow from the well is needed to accomplish these purposes, the United States has a reserved water right to that flow.⁶

Despite the clear statutory language that the Secretary "may *lease* or operate" the wells to produce or use water on the public lands or on other lands

⁶ The United States has here sought and been awarded a federal reserved right to 2.67 cfs, which was the entire production of the well when it was measured in June 1935, shortly before it was leased to Park Center's predecessor. The United States has acknowledged that this reserved right does not allow the federal government to increase the flow of the well beyond 2.67 cfs by some artificial means, such as pumping, and have that increased flow relate back to the date of reservation. Pet. App. 17 n.19.

(30 U.S.C. 229a(c) (emphasis added)) and "may use the proceeds from the *sale or other disposition of such water*" to support continuation of the program (30 U.S.C. 229a (d) (emphasis added)), petitioner contends (Pet. 17-23) that the Conversion Act does not, in fact, authorize the Secretary to lease or otherwise require payment for the use of water from Conversion Act wells. Petitioner points out (Pet. 20) that Subsection (c) of the original bill was amended in committee by striking out certain words in the original version which referred to selling, leasing, or purchasing water, and adding new language providing that the water was to be used for beneficial use.

These amendments, however, do not indicate a congressional intent to change the bill so as to deny the Secretary authority to lease the water. If that had been the intent, the committee would have also stricken the words "lease or" where they appear in the phrase which provides that the Secretary "may lease or operate such wells." Likewise, the committee would have amended Subsection (d) by eliminating the reference to "the proceeds from the *sale or other disposition of such water*."

The Senate report in fact discloses that all of the amendments that were incorporated into the final version of the bill were adopted verbatim as suggested in a letter of the Secretary of the Interior commenting upon the bill. S. Rep. No. 1378, *supra*, at 2. The Secretary's letter, which is reproduced in the Senate report, described the bill as one authorizing him "to purchase the casing in wells drilled under oil and gas permits and leases which strike water instead of oil or gas, and to lease or operate such wells for the production and disposal of the water where the water is valuable for agricultural or domestic

use." *Ibid.* There is no hint in the letter of any intent to change this purpose. Shortly after the bill was enacted, the Secretary issued regulations providing, among other things, for the leasing of water from Conversion Act wells. 30 C.F.R. Pt. 241 (1983); see Pet. App. 16 n.18. If petitioner's theory were correct, the Secretary, having himself suggested the amendatory language in order to bar the United States from charging for the use of water, then issued regulations immediately after passage of the statute that were directly contrary to the intent of the very amendments he had just suggested. Such an assumption is wholly implausible.

2. Petitioner points out (Pet. 15-23) that Subsection (a) of the Conversion Act provides that the lands on which the wells are situated shall be reserved as water holes under Section 10 of the SRHA. In petitioner's view, this makes applicable the Colorado Supreme Court's ruling in *Denver I*, 656 P.2d at 31-33, 36, that the extent of federal reserved water rights for public springs and water holes withdrawn under Section 10 of the SRHA is limited to the minimal amount necessary for the purposes of preventing the monopolization of water needed for domestic and stockwatering purposes.

The flaw in this argument, as the Colorado Supreme Court recognized (Pet. App. 13-17), is that it entirely fails to recognize that the right to the use of water flowing from the converted wells rests not only on Section 10 of the SRHA, but also on the Conversion Act, with its distinct statutory purposes. Unlike withdrawals made solely under Section 10 of the SRHA, which contemplated only that enough water should remain in the water holes to allow such use as may be made by the public, the Conversion Act expressly authorizes the Secretary to lease or operate

the wells to produce water both for use on public lands and “for beneficial use *on other lands*.” 30 U.S.C. 229a(c) (emphasis added). The Conversion Act does not restrict the Secretary to lease only when, and in such amounts as, such leasing may be necessary to prevent monopolization.

3. Petitioner complains (Pet. 7-15) that the Colorado Supreme Court repudiated the approach articulated by this Court in *United States v. New Mexico*, *supra*, that, under the “implied-reservation-of-water” doctrine, Congress is assumed to have reserved “‘only that amount of water necessary to fulfill the purpose of the reservation, no more’” when it reserves federal land. *Id.* at 700 (quoting *Cappaert*, 426 U.S. at 141). We note at the outset that application of the implied-reservation-of-water doctrine is required only when “the reservation [of water] is implied, rather than express.” See *New Mexico*, 438 U.S. at 701. This case in fact involves a statute, the Conversion Act, which makes express provision for the use of water from federally owned wells.

But in any case, the Colorado Supreme Court explicitly applied the standard set forth in *New Mexico* and *Cappaert*, according to which the court is to:

determine the precise federal purposes to be served by [the] legislation; determine whether water is essential for the purposes of the reservation; and finally determine the precise quantity of water—the minimal need as set forth in *Cappaert* and *New Mexico*—required for such purposes.

Pet. App. 13 (quoting *Denver I*, 656 P.2d at 20). As we have recounted above, the court in this case determined the federal purposes to be served by the Conversion Act (see Pet. App. 16), and determined

the quantity of water minimally needed to fulfill those purposes (see Pet. App. 16-17). Petitioner simply disagrees with the application of the *New Mexico* standard to the facts of this case.⁷

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1990

⁷ Moreover, even if petitioner's arguments concerning the extent of the Conversion Act reserved water right were meritorious, the United States would nonetheless prevail in this case on alternative grounds. As the water court correctly ruled (Pet. App. 31-35), petitioner is collaterally estopped from challenging the United States' reserved water right claim because that same issue had already been resolved against petitioner in the 1977 IBLA decision. Furthermore, as the water court also properly ruled (Pet. App. 35-36), petitioner is estopped under the terms of its lease from claiming a permanent water right in the Park Center Well.

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No. 89-1194

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1989

PARK CENTER WATER DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA, STATE OF
COLORADO, AND DIVISION ENGINEER,
WATER DIVISION NO. 2,
Respondents.

REPLY BRIEF OF PARK CENTER WATER DISTRICT

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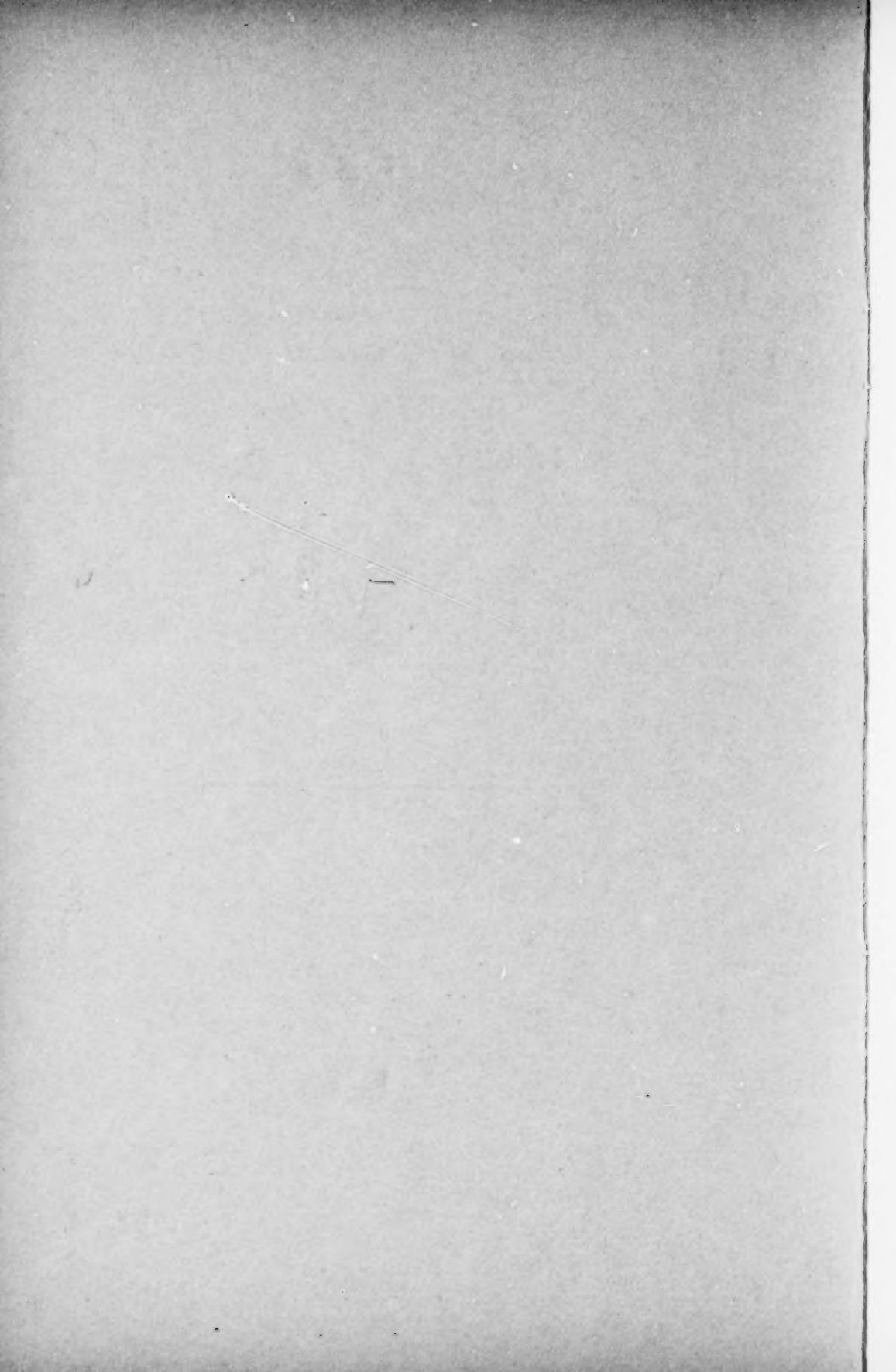


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REPLY BRIEF OF PARK CENTER WATER DISTRICT

ARGUMENT

In its Brief In Opposition to Park Center's Petition, the United States argues: (a) that there is an alternative state law basis for affirming the decision below, and (b) that the Conversion Act *expressly* reserves water from converted oil and gas wells. Neither argument survives even a cursory analysis.

I. THE QUESTION PRESENTED IS SOLELY A MATTER OF FEDERAL LAW AND THERE IS NO ALTERNATIVE GROUND UPON WHICH THE UNITED STATES CAN RELY.

The United States claims that it would "nonetheless prevail in this case on alternative grounds" even if the Colorado Supreme Court incorrectly applied the implied-reservation-of-water doctrine to the Park Center Well. U.S. Br. 12 n. 7. In support of this assertion, the United States explains that the water court "correctly" and "properly" ruled that Park Center is estopped from claiming a water right and from challenging the United States' reserved water right. This explanation, however, represents solely the opinion of the United States and not the Colorado Supreme Court. The Colorado Supreme Court specifically did *not* express an opinion on the estoppel issues. See Pet. App. 12 n. 13; 19 n. 22. There is, therefore, no determination with regard to the correctness of the water court's estoppel rulings. As such, there are no alternative grounds for the United States to rely on. Indeed, under the circumstances, it would appear that the

Colorado Supreme Court found little merit in the estoppel arguments. Instead of resolving the case on these state law grounds, the court proceeded to resolve the more difficult federal reserved water right questions.

II. THE CONVERSION ACT DOES NOT EXPRESSLY RESERVE WATER FROM CONVERTED OIL AND GAS WELLS.

The United States off-handedly remarks that the implied-reservation-of-water doctrine is not even applicable in this case because the reservation of water is *express*. U.S. Br. 11. The scant attention given to this assertion belies the propriety of raising it in the first place. The United States made a similar argument to the water court, *see* Pet. App. 39-40, but conceded on appeal that the implied-reservation-of-water doctrine applied in this case. *See* Pet. App. 11-12. Nevertheless, now that the United States has resurrected the argument, it must be dispensed with once and for all.

The apparent basis for the United States' claim that the Conversion Act provides an express reservation of water is its perception that the Conversion Act is somehow different from other land reservation statutes because the Conversion Act expressly "mentions" and "concerns" water. Admittedly, the Conversion Act is different from other land reservation statutes; not because it mentions or concerns water but because, quite simply, it is *not* a land reservation statute. Instead, the Conversion Act authorizes a well casing purchase program that addresses two separate and distinct property interests – the well structure, and rights to the water flowing from that

well structure. Despite the United States' attempt to equate the two, the well structure and the water flowing from it are treated differently in the act. Only the well structure was to be purchased. Once purchased, that structure could be leased or operated to recover the costs associated with the well casing purchase program. There is, however, no express authorization in the Conversion Act to lease the water. Congress did not, in the Conversion Act, deviate from its traditional deference to the states in the control and allocation of water on federal lands. Thus, with the exception of the water impliedly reserved for the underlying public water hole land reservation, any rights to the water flowing from the well structure were to be obtained in accordance with state water allocation rules.

Moreover, the United States' suggestion that the "difference" between the Conversion Act and other land reservation statutes is attributed to the fact that the Conversion Act mentions and concerns water is not even accurate. There are a number of land reservation statutes that mention and concern water. The Organic Administration Act of 1897, 16 U.S.C. §§ 473 *et seq.*, for example, authorized the set aside of national forests for the purpose of, *inter alia*, securing favorable conditions of *water flows*. President Truman's Proclamation pursuant to the Antiquities Act of 1906, 16 U.S.C. § 431, with regard to Devil's Hole (Proclamation No. 2961) withdrew from the public domain a tract of land that contained a remarkable underground *pool of water*. And Public Water Reserve No. 107 issued pursuant to the Stock Raising Homestead Act, 43 U.S.C. §§ 291 *et seq.*, withdrew from entry and settlement public lands that contained *springs or water holes*.

Despite such references to and concerns with water, the federal reserved water rights associated with these federal enclaves, which were determined in accordance with the implied-reservation-of-water doctrine, do *not* extend to: (a) the entire flow of water in national forests, see *United States v. New Mexico*, 438 U.S. 696 (1978); (b) the highest level of water in the Devil's Hole pool, see *Cappaert v. United States*, 426 U.S. 128 (1976); or (c) the entire yield of public springs and water holes, see *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1983).

Indeed, the United States' reliance on the fact that the Conversion Act mentions or concerns water highlights a fundamental misunderstanding of the implied-reservation-of-water doctrine. The basic rationale for federal reserved water rights is that the water necessary for the primary purpose of the land reservation needs to be protected from diversion and use by private appropriators. See, e.g., *U.S. v. Jesse*, 744 P.2d 491, 498 (Colo. 1987). Thus, with regard to national forest lands, a certain amount of water has been reserved for those lands so that private appropriators cannot divert it away, thereby defeating the primary purpose of the forest land reservation (i.e., timber production and watershed protection). See *United States v. New Mexico*, 438 U.S. 696 (1978). Similarly, with regard to Devil's Hole, a certain water level in the pool was needed to maintain the pupfish – the object of that land reservation. See *Cappaert v. United States*, 426 U.S. 128 (1976). That level had to be protected against private appropriators who were withdrawing water from the same groundwater aquifer. *Id.*

There was never a similar intention to protect *all* of the water of Conversion Act wells from private appropriators. To the contrary, the intent was, in large measure, no different than the goal of the Organic Administration Act in which "Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West." *United States v. New Mexico*, 438 U.S. at 713. Similarly, in the Conversion Act, Congress authorized the well casing purchase program as a means of preserving the artesian flow of water from these converted oil and gas wells so that the water could be made available for use by private appropriators. The Senate discussion on the bill could be no clearer on this point. See 1934 Cong. Rec. 11,116-117.

CONCLUSION

As a final matter, Park Center directs this Court's attention to what is absent from the United States' Opposition Brief. The United States' refusal to address the points raised in the Petition about the Colorado Supreme Court's clear departure from the *New Mexico* rule underscores the importance of this case. Like the Colorado Supreme Court, the United States ignores the *land reservation* predicate and the *primary purpose* limitation. The United States' only response is that the Colorado Supreme Court must have applied the *New Mexico* rule correctly because: (a) the court said as much, and (b) the court "determined the federal purposes to be served by the Conversion Act." U.S. Br. 11-12. Obviously, this is not the standard that this Court established in *New Mexico*.

The Colorado Supreme Court was required to identify the primary purpose of the land reservation, not simply the purposes to be served by the Conversion Act. By failing to identify that primary purpose, the Colorado Supreme Court was unable to quantify the minimal amount of water necessary to ensure that that purpose is not entirely defeated.

For these various reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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